

C o m p a r i s o n

between the Divorce Law of the British Commonwealth,
U.S.A., and certain Continental Systems of Law,
with particular regard to the Execution of Foreign
Judgments.

By

Dr Frederick Welt.

Thesis for the Degree of Ph.D.



****T a b l e of C o n t e n t s****
*** * * * ***

P a r t I.

	Page
Introduction and Preliminary Matters.	
Chapter I. Introduction	1
Chapter II. Sources of Law on Divorce	3
Chapter III. s.1 Interpretation of Statutes	15
s.2 Characterisation	21
s.3 Preliminary Question	26
Chapter IV. Renvoi or Remission	29
Chapter V. Domicil and Nationality	50
Chapter VI. Husband and Wife	67

P a r t II.

Chapter VII. Divorce Law in British Commonwealth and in U.S.A.	89
Chapter VIII. Continental Systems of Law on Divorce	125
Chapter IX. Conflict Rules as to Choice of Law	163

P a r t III.

Chapter X. s.1 Substance and Procedure	187
s.2 Nature of the Suit for Divorce	191
Chapter XI. s.1 Principles of Divorce Proceedings in general	197
s.2 Special Rules Relating to Procedure in Divorce under the Various Systems of Law	208

P a r t IV.

Chapter XII. Theories as to the Foundation of Recognition and Enforcement of Foreign Judgments	219
Chapter XIII. Recognition of Decrees of Divorce in the British Commonwealth	233
Chapter XIV. U.S.A. Law on Recognition of Foreign Decrees of Divorce	251

Chapter XV.	Continental Systems of Law on Recognition of Foreign Judgments of Divorce	256
Chapter XVI.	s.1 Reciprocity as Requirement for Recognition ss.2-9 The Principle of Public Policy s.10 Recognition of Decrees of Divorce imposing Restrictions on Remarriage	276 278 287

P a r t V.

Chapter XVII.	Enforcement of Orders and Judgments Concerning Matters Ancillary to Divorce	289
Chapter XVIII.	Comparison of the Requirements for Recognition and Enforcement of Foreign Judgments.	308

Table of Statutes.

Page

I. British Commonwealth:

(a) English Statutes:

Statute of Limitations, 1623, (21 Jac.1 c 16)	188, 295
Matrimonial Causes Act, 1857, (20&21 Vict. c 85)	4, 9, 16, 237
Matrimonial Causes Act, 1860, (23&24 Vict. c 144)	200
Offences against Person Act, 1861 (24&25 Vict. c 100)	72, 99
Matrimonial Causes Act, 1866, (29&30 Vict. c 32)	214
Judgments Extensions Act, 1868, (31&32 Vict. c 54)	295
Judicature Act, 1873, (36 & 37 Vict. c 66)	8
Married Women's Property Act, 1882, (45&46 Vict. c 75)	73, 76, 86
Matrimonial Causes Act, 1884, (47&48 Vict. c 68)	78
Larceny Act, 1916, (6&7 Geo. 5 c 50)	73
Maintenance Orders (Facilities for Enforcement) Act, 1920, (10 & 11 Geo. 5 c 33)	299
Administration of Justice Act, 1920, (10&11 Geo. 5 c 81)	296
Matrimonial Causes Act, 1923, (13 & 14 Geo. 5 c 19)	95, 203
Law Property Act, 1925, (15 Geo. 5 c 20)	82
Supreme Court of Judicature (Consolidation) Act, 1925, (15 & 16 Geo. 5 c 49)	8, 9, 86, 193
Summary Jurisdiction (Separation and Maintenance) Act 1925, (15 & 16 Geo. 5 c 51)	112
Judicial Proceedings (Regulation of Reports) Act, 1926, (16 & 17 Geo. 5 c 61)	205
Legitimacy Act, 1926, (16 & 17 Geo. 5 c 60)	28, 193
Foreign Judgments, Reciprocal Enforcement) Act, 1933, (23 Geo. 5 c 13)	298
Law Reform (Married Women & Tortfeasors) Act, 1935, (25 & 26 Geo. 5 c 30)	82
Matrimonial Causes Act, 1937, (1 Edw. 8 & 1 Geo. 6 c 57)	94, 101, 239
Matrimonial Causes at Assizes Order, 1937, St.R. & O. No. 1173)	245
Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 & 2 Geo 6 c 63)	293
Courts (Emergency Powers) Act, 1939, (2 & 3 Geo 6 c 67)	211

(b) Scottish Statutes:

Act, 1600, c 20	118
Conjugal Rights (Scotland) Amendment Act, 1861, (24 & 25 Vict. c 86)	114
Divorce (Scotland) Act, 1938, (1 & 2 Geo 6 c 50)	114

(c) Matrimonial Causes (Northern Ireland) Act, 1939, (2 & 3 Geo. 6 c 13)

118

(d) Australia :

New South Wales: MCA, 1899, No. 14, MCA, 1922, No. 3	
MCA, 1929, No. 5	248
Queensland, MCA, 1923, No. 38	248
South Australia, MCA, 1929, No. 1889	248
Tasmania, MCA, 1919, No. 65	248
Victoria, 1928, No. 3726	248
Western Australia, MCA, 1929, No. 7	248

(e) Canada: Dominion Act, 1930, c 15	Page 248
(f) New Zealand: Matrimonial Causes Act, 1928,	249
(g) India: Indian and Colonial Divorce Jurisdiction Act, 1926, (16 & 17 Geo.5 c 40)	227, 242, 229, 299
(New Guinea, Divorce and Matrimonial Ordinance, 1934,	249
II. United States of America: Constitution Article IV	254
Uniform Declaratory Judgment Act	194
Uniform Desertion and Non-Support Act	87
Section 22, entitled " Evasion of Law " of the Uniform Annulment of Marriage and Divorce Act	255
III. Austria: Austrian Civil Code, 1811,	61
Jurisdiction Rules, 1895,	65
Code of Civil Procedure, 1895,	95, 209
Law Relating to Executorial Procedure, 1896,	264
IV. France: Civil Code, 1804	10, 61, 80
Law of 1884	74
Code of Civil Procedure	216
Law of February 6, 1893,	128
Law of June 16, 1919	210
V. Germany: Introductory Act to the Civil Code	178
Code of Civil Procedure	78, 195, 215
Law of July 6, 1938,	230
Decree of July 27, 1938,	138
	195
VI. Switzerland: Swiss Civil Code, 1907,	11, 62
Federal Law of 1891	30
Swiss Constitution, Art. 54 IV	53
Swiss Constitution Art. 113	207
VII. Italy: Civil Code	285
Code of Civil Procedure	275

List of Books.

- R.Aghion, French Law as applied to British subjects and companies, 1935,
 E. Martin, droit international privé, 1932, (2 vols.)
 L.T. Bates, The Divorce and Separation of Aliens in France, 1929,
 Beale, A Treatise on the Conflict of Laws, 1935, (3 vols.)
 W.E. Beckett, The Question of Classification in the British Yearbook of International Law, 1934, pp. 46 ff.
 Bishop, New Commentaries on Marriage, Divorce and Separation,
 Browne and Latey, Law and Practice on Divorce and Matrimonial Cause, 1931,
 Bradway J. The Myth of the Innocent Spouse in Tulane Review, 1936-1937 , pp 377 ff.
 Burge W. Commentaries on Colonial and Foreign Laws, 1907-1928, (5 vols)
 Cachard, The French Civil Code,
 Cheshire A.C. Private International Law, 1938,
 Cohen Hermann, The Foreign Laws on Marriage and Divorce, 1937,
 Curti, Essay on Swiss Law, in European Handbook on Laws,
 Dart A.L. Adultery as a defence to a Divorce Action, in Tulane Review, 1936, 1937, pp 95 ff
 Dicey, A Digest of the Law of England, with reference to the Conflict of Laws, 5th Edition by A. Berriedale Keith, 1932,
 Dunkan & Dykes, Principles of Civil Jurisdiction as applied in the Law of Scotland, 1911.
 Ehrenzweig, System of Austrian Civil Law,
 Everst L.F. Law of Estoppel,
 Eversley's Law of the Domestic Relations by Alexander Cairns, 5th Edition, 1937,
 Falconbridge J.D. Characterisation in the Conflict of Laws, in Law Quarterly Review, Vol. 53, Page 236 ff,
 Foote I.A. A Concise Treatise on Private International Law 5th edition, 1925,
 Frankenstein, Internationales Privatrecht, 4 vols, 1926-1935,
 Fraser, Husband and Wife, 2 vols.
 Gibb A.D. International Law of Jurisdiction in England and Scotland, 1926,
 Goodrich, Handbook of the Conflict of Laws, 1927,
 Graveson R.H. The Doctrine of Evasion of the Law in England and America in Journal for Comparative Legislation and International Law, 1937, pp 21 ff
 Gutteridge A.C. The Comparative Aspects of Legal Terminology, in Tulane Review, Vol. 11 page 401,
 Griswol E.N. Renvoi revisited, 51 Harvard Law Review pp 1169 ff,
 Kuhn A.K. Comparative Commentaries on Private International Law, 1937,
 Kelson H. The Pure Theory of Law, Translated by Wilson Ch. in Law Quarterly Review, 1934, pp 477 ff and 1935 pp 517 ff.
 Latey W. Jurisdiction and Recognition in Divorce and Nullity Decrees, 1933, and
 Law and Practice in Divorce and Matrimonial Causes 1940.

- Laurent, Le droit civil Internationale, 1882,
E. Lehr, Le Marriage et le Divorce, 1899,
Lush, Husband and Wife, 1933,
L. Mackinnon, Leading Cases in the Private International
Law of Scotland, 1937,
I. H. C. Morris, Cases on Private International Law, 1939,
Law of the Domicile, in British Yearbook
of International Law, 1937, pp 32 ff.
Phipson, On Evidence, 1930,
Francis Piggott, Foreign Judgments and Jurisdiction,
3rd edition, 1908-1910,
A. Pillet, Principes de droit internationale privé, 1903,
Planiol et Ripert, Traite elementaire de droit civil, (14 vols)
Dr Rudolf Pollak, System des oesterreichischen Civil-
prozessrechtes, mit Einschluss des Exekutionsrechtes, 1906,
H. E. Read, The Recognition and Enforcement of Foreign
Judgments in the Common Law Units of the British Commonwealth, 1938,
Renton, The Comparative Law of Marriage and Divorce, 1910,
Wood Renton, Reciprocal Execution of foreign Judgments,
in Juridical Review, 1933, pp 25 ff.
Restatement of the Law of Conflict of Laws as adopted
and promulgated by the American Law Institute, 1934,
A. H. Robertson, Preliminary Question in the Conflict
of Laws, in 55 Law Quarterly Review, pp 576 ff,
Ruggiero, diritto civile, Roma, 1930,
Savigny, A Treatise on the Conflict of Laws, translated
by W. Guthrie,
Schreiber, The Doctrine of the Renvoi, in Anglo-American Law,
in 31 Harward Law Review, pp 523 ff,
Schuster, German Civil Law,
L. Shelford, Law of Marriage and Divorce, 1841,
I. G. Starke, The Relation between Private and Public
International Law in Law Quarterly Review, 1936, pp 395 ff,
B. Tompson, The Consortium of the Marriage Contract,
in Journal of Comparative Legislation and International Law, 1924,
pp 27 ff,
Chester G. Vernier, American Family Law, (5 vols)
G. Walker, Internationales Privatrecht, 5th edition, Vienna, 1934,
Amos and Walton, Introduction to French Law,
Walton, Husband and Wife, 2nd edition, 1922,
Warton, A Treatise on the Conflict of Laws or Private
International Law, 1881,
Westlake, A Treatise on Private International Law,
7th edition by Norman Bentwich, 1925,
I. Williams, The Sources of Law in the Swiss Civil Code, 1923,
Swiss Civil Code.

on domicile and nationality is the more necessary because
conflict in the test of jurisdiction and of choice of law is
the Anglo-American systems of law and nationality princi-
pally is used as such test in the Continental systems of law.
The internal law on divorce of the countries concerned
will be stated and the rules as to choice of law which

P a r t I.

Introduction and Preliminary matters.

Chapter I.

The purpose of this thesis is to treat of the general principles and doctrines of the law on divorce which prevail in the Anglo- American common law units and in certain continental systems of law, the French, Austrian , German, Swiss and Italian, with particular regard to the fundamentals and applications of the rules as to conflict of laws governing this subject matter.

In contrasting these laws and rules the diversity or similarity of the views on these problems in the different systems of laws will be set out :

In Part I some important preliminary matters, such as sources of law, interpretation and characterization, further the doctrine of renvoi, the law on domicile and nationality as the principal tests of jurisdiction and of choice of law, and the law on husband and wife will be discussed; the doctrine of renvoi and the law on domicile and nationality will be analysed, more fully in respect of their important bearing on the topic of conflict of laws; the fuller treatment of the latter subject, namely law on domicile and nationality is the more necessary because domicile is the test of jurisdiction and of choice of law in the Anglo-American systems of law and nationality principally is used as such test in the Continental systems of law. The internal law on divorce of the countries concerned will be stated and the rules as to choice of law which

relate to them will be attached thereto in Part II.

An outline of the rules governing procedure in causes of divorce will be given in Part III where only the most striking features of these rules will be shown insofar as they contrast with those relating to ordinary proceedings in civil matters.

The Since international jurisdiction of the court rendering a judgment of divorce is the most important requirement of its recognition, the subject matter of recognition of foreign judgments of divorce will be discussed in connection with that of jurisdiction in Part IV.

Finally, Part V will cover enforcement of foreign orders and judgments concerning matters ancillary to divorce.

In the following pages the word " d o m i c i l ", written thus, is used in the Anglo- American sense of the term, whereas the word " d o m i c i l e " will be used in the Continental connotation, as far as possible; for the distinction between these terms reference is made to page ...62...

Further, the word " d i v o r c e " , used without any qualification will mean divorce " a vinculo matrimonii " (from bond of matrimony).

Chapter II.

Sources of law on divorce.

England, before 1857.

I. Canon law. After the Norman Conquest ecclesiastical courts exercised jurisdiction in matrimonial matters; the old marriage customs were superseded by the canon law. Since the canon law did not recognise the dissolubility of the marriage bond, a divorce a vinculo matrimonii (i.e. divorce absolute with the right to marry again) could not be obtained from those courts; they granted among other reliefs divorce a mensa et thoro i.e. from bed and board. Divorce a vinculo matrimonii could be procured only by means of a private act of Parliament dissolving the marriage bond. From 1669, when the first divorce a vinculo matrimonii by act of Parliament was granted, till 1857, about 150 private acts of Parliament granting divorces a vinculo matrimonii were passed. The essential requirements for such a "legislative" divorce were (1) a divorce a mensa et thoro on the ground of adultery obtained from the ecclesiastical court and (2) a successful action for criminal conversation against the adulterer brought in the King's Bench; in very few cases such a private act of Parliament was passed in favour of a wife after she had procured a decree a mensa et thoro against her husband on the ground of adultery committed under aggravated circumstances.

Chapter II.

Sources of law on divorce.

England, before 1857.

I. Canon law. After the Norman Conquest ecclesiastical courts exercised jurisdiction in matrimonial matters; the old marriage customs were superseded by the canon law. Since the canon law did not recognise the dissolubility of the marriage bond, a divorce a vinculo matrimonii (i.e. divorce absolute with the right to marry again) could not be obtained from those courts; they granted among other reliefs divorce a mensa et thoro i.e. from bed and board. Divorce a vinculo matrimonii could be procured only by means of a private act of Parliament dissolving the marriage bond. From 1669, when the first divorce a vinculo matrimonii by act of Parliament was granted, till 1857, about 150 private acts of Parliament granting divorces a vinculo matrimonii were passed. The essential requirements for such a "legislative" divorce were (1) a divorce a mensa et thoro on the ground of adultery obtained from the ecclesiastical court and (2) a successful action for criminal conversation against the adulterer brought in the King's Bench; in very few cases such a private act of Parliament was passed in favour of a wife after she had procured a decree a mensa et thoro against her husband on the ground of adultery committed under aggravated circumstances.

II. Since 1857.

(A) Case law and statute.

By the Matrimonial Causes Act, 1857, the jurisdiction of the ecclesiastical courts in matrimonial matters was conferred upon the Matrimonial Causes Court created by the Act; thus the latter court exercised jurisdiction in matrimonial matters as suits of divorce a mensa et thoro, to which was given the name of suits for judicial separation, suits of nullity, restitution of conjugal rights, jactitation, and ancillary matters, as custody of children, alimony and maintenance.

By that Act was also assigned to the court above named the powers of granting absolute divorce, equivalent to those exercised by way of the private acts of Parliament mentioned above.

Section 22 of the Act of 1857 directs the MC Court in all proceedings other than proceedings for divorce absolute, to proceed on principles and rules which shall be as much as may be conformable to the principles and rules of the ecclesiastical courts, laid down in their judgements.

Again, s.27 of the same Act states that when a wife shall ask for divorce on the ground of adultery coupled with cruelty, the cruelty must be such cruelty as without adultery would have entitled her to divorce a mensa et thoro, now termed judicial separation. As the House of Lords had, in dealing with private bills for dissolution of marriage, an established practice on this subject based mainly on canon law rules, it was held by the courts that in cases where the principles of its

procedure were at variance with those of the ecclesiastical courts in suits for dissolution of marriage the authorities of the House of Lords were preferred, while in all other suits the principles of the ecclesiastical courts were to be observed.

(B) Common law. The Matrimonial Causes legislation is far from covering the entire field of these matters and a large body of case law has grown up, ruling questions of divorce, founded to a great extent, on common law rules, since most of the relative conceptions are based on the common law of husband and wife. It must be borne in mind that the divorce petition is not a common law action but a statutory one; on the other hand, the common law on husband and wife afforded the relevant conceptions for the judgments of divorce.

Theory of the binding power of precedent.

The theory of the binding power of the judicial precedents, also called the theory of the "stare decisis" is the most important feature of English case law: Where a case involves a clear principle which has been the subject of a decision by the House of Lords, or the Court of Appeal, that decision must be followed by every other court below it.

Macale
French v. Macale, 1842, 2 Duer and War 269.

The theory of the binding power of precedents applies to precedents relating to common law as well as to statutes; it is this theory of the binding power of precedents coupled with the extraordinary concentration of the English courts that brought about that most important

8
Driving &
Wainen

essential of law viz. the certainty in the English law system.

The binding power of precedents was acknowledged by the House of Lords even with regard to its own decisions and it was laid down in *Wilson v. Wilson* (1854)

H/L. Cases 40, that its decision, when once pronounced in a particular case, was conclusive in that case and that it would not be reversed except by Act of Parliament but, if the House should afterwards be of opinion that an erroneous principle had been adopted in the first case, the House would not be bound in any other to adhere to such principle. See also *Tormuey v. White* (1853)

And in fact, the courts dealing with a proper case will not hesitate to reconsider a principle laid down in a previous case and by such restating of guiding principles operates that other element necessary for the progressive trend of law i.e. its flexibility. Mention may be made in this connection of the decisions of *Le Mesurier v. Le Mesurier* (1895) AC 517 and *Armitage v. Attorney General* (1906) P 135 on the question of domicile as test of jurisdiction in divorce proceedings.

A previous decision of the Court of Appeal will be followed on precisely similar facts, if that decision is not expressly overruled by the House of Lords, though that tribunal may have disapproved the reasoning on which the decision is founded. *Consett Industrial Society v. Consett Co.* (1922) 2 Ch/ 135 (CA).

Finally, every court is absolutely bound by the decisions of all courts superior to itself. But a case is only an

London Presl
Tranway's G. v.
L.C.C. (1893)
A.C. 375 379
Dicey 7-18
London 7-69
Beamish v.
Beamish (1861)
9 H.L.C. 274
HLC 3/3
2 2
Salmond's Ind.
1192

8
07

?

authority for what it actually decides, as Lord Halsbury put it in *Quinn v. Leatham* (1901) AC 495, 506.

C. Equity.

Family law has apart from the field covered by common law developed to some extent through the jurisdiction of the Chancellors who were till 1529 (Cardinal Wolsey)

ecclesiastics and exercised jurisdiction in Equity in the Court of Chancery. This court was a court of conscience;

h/ were the rigidity of Common Law was irreconcilable with good conscience, relief could be obtained in Chancery

in in three ways i.e. by granting (1) an equitable remedy in aid of equitable rights as, e.g. remedies in trust cases (exclusive jurisdiction), (2) an equitable remedy in aid of a legal right e.g. injunctions (concurrent jurisdiction) and (3) equitable assistance, e.g. for discovery (auxiliary jurisdiction).

By the relief granted in Equity to married women, some of their disabilities, based on the Common Law theory of the " unity of husband and wife " were gradually removed; thus has developed the doctrines of " separate use " and of " equity to a settlement " which greatly improved the legal position of married women. Hence the body of substantive and procedural rules of Equity covers various branches of family law, especially those of the equitable rights of married women and guardianship. Till 1857 jurisdiction over custody and maintenance of children which, since then, as ancillary matters to divorce, comes within the jurisdiction of the divorce court, was exclusively

exercised by the Court of Chancery. By the Judicature Act, 1873, the administration of common law and equity was fused into one system. The distinction between law and equity was not abolished and the courts must, in dealing with either of them, consider the corresponding rules. By s. 25, subs. 11 of the Judicature Act, 1873, it was provided that, in any case in which there is any conflict between rules of equity and the rules of law with reference to the same matter, the rules of equity shall prevail.

The Judicature (Consolidation) Act of 1925 sec 44 contains the same provision with special reference to questions relating to the custody and education of children.

Sir/ The reasons for this preferential treatment of Equity and for the rule that the older judicial precedents in Equity are of little value, whereas at Common Law the contrary rule as to the value of precedents prevails, are most clearly given by George Jessel, Master of the Rolls in Re Hallett LR 13 CH D 716 as follows: " It must not be forgotten that the rules of equity are not, like the rules of Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time. In many cases we know the name of the Chancellor who invented them. Undoubtedly they were invented to secure the best application of justice, but nevertheless they were invented. Take such things as those: The separate use of a married woman, the restraint

on alienation. We can state the date when they were first introduced into equity jurisprudence, and therefore in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined, and improved: and if we want to know what the rules in equity are, we must look, of course, rather to the modern than to the more ancient cases."

Finally, it is to be noticed that some equity maxims are the bases for **rules** of divorce law, as for instance, rules concerning bars to divorce.

See p102.

(d) Rules of Court: The power of delegate legislation to make rules on procedure in matrimonial matters was conferred upon the Divorce Court by sec. 53 of the MC Act of 1857, now superseded by ss. 99.100 and 213 of the Judicature (Consolidation) Act, 1925.

The Matr. Causes Rules 1924 have been superseded by the M.C. Rules 1937 ; MC Rule 81 states that subject to the provisions of those rules and any statute, the Rules of the Supreme Court shall notwithstanding the provision of Order 68 thereof apply with the necessary modifications to the practice and procedure in matrimonial matters. Order 68, rule 1 mentioned above lays down that, subject to the provisions of that Order, nothing in those rules, save as expressly provided, shall affect the procedure or practice in proceedings for divorce or other Matrimonial Causes.

Sources of law on divorce in U.S.A.:

As in England, common law and statutes prevail as sources of law on divorce in U.S.A. ; the statutes often lay down only the settled rules of common law.

Most states of U.S.A. have constitutional provisions relating to divorce, for instance, South Carolina enacted the constitutional provision prohibiting divorce from bond of matrimony; in Georgia a constitutional enactment provides that " no total divorce shall be granted, except on the concurrent verdicts of two juries at different terms of the court "; in some jurisdictions " legislative " divorces are prohibited by such constitutional provisions. It may be noted that " legislative " divorces are still available in a few states of the Union.

For On the rest, the above observations as to binding power of precedent and as to interpretation apply also to American law.

The Restatement of the Law of Conflict of laws, edited by the American Law Institute in 1934, is only of persuasive character to be used for the interpretation of American law, but not as part of the law itself.

Sources of law in the Continental systems.

Whereas English law consists to a considerable extent of judge- made law, the law of the Continental systems is wholly codified; the divorce - law is codified

(a) in France in the Civil Code of 1804, in the sixth title of its book I, as amended by subsequent legislation; the divorce clauses of the Civil Code were abolished in 1816 and restored to it in 1848, subject to

some modifications.

(b) In Austria and Germany in the law of July 6, 1938, Imperial Law Gazette I, p. 807; and

(c) In Switzerland in the Swiss Civil Code of Dec. 10, 1907, arts. 137 - 158. The fact that the law is wholly codified excludes any preponderance of case - law over the statutes; the codification per se makes for certainty in the law, since it is considered all-sufficient.

Yet the statutory provisions are often obscure and incomplete, and the question arises whether judicial decisions are binding upon the judges on deciding subsequent causes : as will presently be shown, by the continental laws judicial precedents have no binding power on the courts, they are generally of persuasive character only; this is the fundamental distinction between the English and Continental method.

On the other hand, where a settled line of decisions contains an interpretation on a point of ~~an~~obscure (obscure) statutory provision or establishes a certain doctrine by the superior courts this will be followed by the lower courts in subsequent causes.

Notwithstanding the fact that Continental precedents have ^{have} no force of law as the English ones, and cannot therefore be called a source of law, a series of such decisions showing a settled practice of the courts may be, termed a " quasi - source " of law.

Although the courts lack the power to legislate by case-law and have to expound only the spirit of the codes, it

is the authority of the Supreme Courts of the countries concerned and the weight of the reasons of their opinions that induces the lower courts to follow judicial precedents and that exercises an important unifying influence in interpreting the Codes.

French law: In France, after the Revolution, a tendency prevailed against case-law which led to the article 5 CC by which judges are not allowed to decide cases submitted to them, by way of general and set decisions. Thus the decision of a French court is binding only in the same cause and the courts are prevented from making law by way of "authoritative" precedents.

Yet the Cour de Cassation, although not bound by law to follow its own decisions, has, in fact, in many a respect laid down a system of coherent principles in its decisions which are followed by the lower courts.

on many occasions,

Thus the decisions of the Cour de Cassation are, theoretically, not authoritative and the lower courts conform to those principles in respect of the weight of the reasons given in the relative precedents.

German law : The binding force of precedent is unknown to German law. Each Senate (Division) of the German Imperial Court may depart from its own decisions, when it thinks it fit : yet the departure from the former decisions of another Senate was subject to certain restrictions; by the Judicature (Amendment) Act of June 28, 1935 it was enacted as follows :

On deciding a point of law the Imperial Court may depart from a decision which was rendered before that Act came

into force.

This rule facilitates the departure from former decisions of the Imperial Courts in order to enable the judges to conform to the new ideas of the National Socialistic regime.

As to future decisions of the Imperial Court the Act of June, 28, 1935 Imp. Law Gazette II, 844. lays down :

Art. 136 : When a Civil Senate of the Imperial Court intends to depart from a decision of another Civil Senate or of the Great Senate on a point of law the Great Senate is to decide the question.

Art. 137: A Civil Senate seized of a matter involving a question of law which is of fundamental importance may invoke the Great Senate to decide the question of law if it thinks fit to do so for reason of the evolution of law or of securing uniformity of decision.

Although the doctrine of the binding force of precedent does not obtain under German law the lower courts follow the decisions of the superior courts and of the Imperial Court for the following reasons :

(1) if the judges depart from a settled line of decisions, they may become liable for damages to the parties concerned under certain conditions,

(2) a judgment of a lower court departing from a settled practice will be reversed on appeal from it.

Swiss law : The binding power of precedents does not obtain under Swiss law either. Here too, it is the function of the Supreme Court, viz. the Federal Court

to secure the uniformity of the administration of law. The Federal Court exercises in civil causes to a certain extent a concurrent jurisdiction with the Cantonal courts and it is the Court of Appeal from the judgments of the appellate Cantonal Courts. The Federal Court also need not not follow its own precedents. Swiss law does not recognise precedents as binding on the judge, yet it allows the judge, where no statutory provision is applicable, to decide ~~and case~~ according to the existing Customary Law, and in default thereof, according to the rules which he would lay down if he had himself to act as legislator; and it ~~direct the judge~~ the judge must then be guided herein by approved legal doctrine and case law. (Sec.I CC). Thus c a s e-law is recognised as a potential guide for the judge in deciding a case..

Chapter III.

1. Interpretation of statutes.

(1) The English method.

(a) For interpretation of a statute, first of all, the preamble and the interpretation- section of the relative statute as well as the general Interpretations Acts 1850 and 1889 are to be used.

(b) It is to be borne in mind that there is the old theory that the statutes are exceptions to the common law and therefore to be limited by a strict interpretation. This is in accordance with the common law theory towards legislative innovation whereunder a statute is to be applied to those cases only which it covers expressly. Although a statute can abolish any rule of common law, it can only do so by express words which alone are to be regarded, whereas in the absence of a manifest intention the common law governs. Hence the old common law rule of the literal (grammatical) canon, also called the golden rule, still applies to the interpretation of statutes. If by application of the literal rule the special part of the enactment were inconsistent with the rest, it may be interpreted in such a way as to avoid absurdity (logical interpretation.)

(c) The point must further be stressed that by a well settled rule the courts interpreting a statute are, in general, not to seek the aid of parliamentary debates, reports of Royal Commissions or other preliminary documents. In *Hilder v. Dexter* (1902) AC 474, at p.477 Earl of Halsbury said: " I have more than once had occasion to

say that in construing a statute I believe the worst person to construe it is the person who is responsible for drafting. He is very much disposed to confuse what he intended to with the effect of the language which in fact has been employed."

(d) In some cases, however, the courts make use of the so called mischief rule in order to interpret obscure enactments. This rule laid down in Heydon's case (1584) Rep. 76 directs the judge to consider in the interpretation of statutes the following things:

- (1) What was the common law before passing of the Act?
- (2) What was the mischief or defect for which the common law did not provide?
- (3) What remedy Parliament had resolved upon and appointed?
- (4) The true reason of the remedy.
Even by employing the mischief rule the use of analogy is excluded.
- (5) Finally, there are certain presumptions of particular importance for the interpretation of social reform enactments: that is presumption against
 - (a) taking away a common law right;
 - (b) barring the subject from the court;
 - (c) interfering with the personal liberty of the individual.

Since the petition for divorce a vinculo matrimonii is not a common law action but a statutory one, introduced by the Matrimonial Causes Act of 1857, the rules as to interpretation do not apply to it, in so far as they relate to the conflict or rivalry between common law and statutes.

Concluding this chapter it may be observed that it is very important that the right interpretation of a new

statute should take place at the start of its administration since a decision relating to the statute carries with it a new precedent to which the binding power of precedents is attached, and the removal of a wrong interpretation would meet insurmountable difficulties as above stated.

(2). The Continental method.

It must be emphasised that under the continental systems, since the law is there nearly wholly codified, there is not exceptional character attached to a statute as under English law which latter leads to a most restrictive interpretation of statutes in order to preserve common law as far as possible.

There are three chief theories on this subject :

(a). The " classical" theory of the completeness of legislation. By this theory a statutory provision always exists to meet every case and the judge subordinate to it is merely to apply the general terms of a statute to the specific factual situation. This is also called the analytical - dogmatic method as opposed to the historo- sociological method.

(b) The theory of the incompleteness of legislation (theory of the school of legal free- thinkers). By this theory there are in every legal system gaps i.e. there are often no statutory rules to be found which might be applicable to certain sets of circumstances, and therefore it is left to the insight of the judge to decide the matters brought before him , independently of

a/ the statutes, according to justice and equity. In all the other cases of obscure statutory provisions the general rules as to interpretation i.e. grammatical and logical method obtains. In order to ascertain the true purpose of the legislature in passing the relative statute and the social background of the enactment, the historical interpretation is to be applied and in this connection a study of the parliamentary debates and the preliminary drafts cannot be overlooked.

(c) Lastly, the Viennese school of the so-called "theory of pure law" takes the view that by the true notion of "positive" law there is no room for a theoretic existence of gaps in the law. At any rate, gaps in the law which may be such as arise from the difference between positive and desired law, or ambiguities which are due to the frame character of the "norm" cannot be solved by the diverse methods applied by the "jurisprudence of conceptions", such as by the use of argumentum a contrario, analogy or the evaluation of interests. The "jurisprudence of conceptions" conceives the law as a fixed order determining the human behaviour in every direction and seeks to make new from existing norms by means of interpretation. The "theory of pure law", on the contrary, is concerned only with the "positive law" as it is and not with the law as it ought to be nor with evaluation, morals or justice,.- It rejects therefore that traditional legal theory and its illusion of security in law. From the point of view of the theory of pure law the

varying solutions in case of such gaps and ambiguities are of equal value and there does not exist any test determining which of them is to be preferred to the others. Such solutions by way of interpretation found in the scientific commentaries are in reality proposals only to the legislature or to the law making act of the judge. It is emphasised that the making of the "individual norm" viz. judicial decision is a product of both intellect and will, a fact overlooked by the other theories.

By the "theory of pure law" it is left to the unfettered discretion of the judge who is bound by law to decide every case brought before him, and the judge in delivering the decision (individual norm) makes law.

(3). Whether interpretation creates new rules or makes only preparatory work, a certain method as to the approach is necessary. The most modern solution is to be found in para. 1 of the Swiss Code which runs:

"The law must be applied in all cases which come within the letter or the spirit of any of its provisions. Where no provision is applicable the judge shall decide according to the existing customary law, and in default thereof, according to the rules which he would lay down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case law."

The Swiss law thus takes a middle course between those two conflicting theories in points (a) and (b). On the one hand, it requires the judge to apply the statute to the case in dispute, and, on the other hand, on the other hand, it leaves it to his insight, if there is

no statutory or customary provision applicable, to decide the case according to the rules which he would lay down if he had himself to act as legislator.

Under the Austrian law, para. 6 of the Austrian Civil Code, the judge is required in default of a statutory provision to decide the case according to principles of "natural law". The writers on this subject take the view that by this provision is meant that the judge is to endeavour to ascertain how the legislature would have decided the case if he had thought of it.

The German Civil Code does not contain any rule relating to its interpretation. The framers of the Code regarded it as useless to lay down a certain method of interpretation. Thus it is left to the discretion of the judge to decide a case which is not covered by the Code, as he thinks just and equitable.

The French Civil Code is equally lacking in rules concerning methods of its interpretation. On the other hand, art. 4 of the French Civil Code provides that "a judge who refuses to decide a case, on the pretext that the law is silent, obscure, or insufficient, may be prosecuted as being guilty of a denial of justice." Since the silence of the Code on some subject is no reason for refusal of a decision the Code confers thereby upon the judge the power of judicial discretion with regard to such cases of gaps in the law or of ambiguous provisions.

2.Characterization.

It is often doubtful whether a matter is of judicial or administrative nature, or whether a rule is of procedural or substantive character, and thus sometimes arises a conflict of the laws as to the interpretation of legal terms or as to the classification of doctrines. In order to decide any such question of conflict of laws one must use a certain mode of approach to that question of characterization, as it is generally termed by the writers on this subject.

(a) Primary characterization. A court which has to decide a case containing a foreign element is required, first of all, to ascertain into which legal category a factual situation or a rule of law or an institution falls. Thus, when, for instance, an action is brought for dissolution of a foreign marriage in an English Court, this court will investigate whether that marriage is capable of divorce proceedings being instituted at all, in other words, whether that foreign institution may be deemed to be a monogamous marriage which alone is capable of a divorce proceeding under English law.

See the cases of Hyde v. Hyde and Woodmansee (1866) LR 1 P and D 130,133.- Nachimson v.Nachimson (1939) P 85, 217 CA. R.v. Hammersmith Spt. Registrar, ex p.Mir-Anwarrudin (1917) 1 KB 634.

There are three theories to reach a solution of the problem:

- (1) the theory that the foreign law is to be applied to the so-called primary characterization;
- (2) the theory that the lex fori is applicable to it;
- (3) the theory of the analytical jurisprudence.

The foreign law theory is to be rejected as illogical ; for one cannot characterise a matter, rule or institution by applying a foreign law that is to be selected on the basis of that characterization.

The authorities are unanimously of opinion that for primary characterization the internal law of the forum viz. in the case above supposed, English internal law is the criterion.

In cases only where no similar concept exists in the system of the forum, some writers suggest as a proper principle of characterization, that the internal law of the forum should for this purpose be enlarged by an analytical framework of general rules built up on the basis of analytical jurisprudence and comparative law: they point out chiefly that only conceptions of such a general character in connection with the internal law will enable the court to decide such questions as between different systems of law. The suggestion for this proper principle of primary classification was first made by Rabel.

(b) The next step is to select the connecting factor which leads to the designation of the law appropriate to the determination of the question. The characterization of the connecting factor is to be effectuated in the same way as in point (a) above, by applying the law of the forum.

As will be discussed in detail later, the domicile of the spouses is, in general, the criterion for the jurisdiction as well as for the choice of law applicable to proceedings for divorce under the Anglo-American law systems while in most continental systems, nationality of the spouses is that criterion. The English concept of domicile differs from that of the continental systems; see p.62....

Hence where an action for divorce is brought in an English court, the English conception of domicile will be employed to the determination of the question of whether an English domicile of the spouses, as test of the jurisdiction of the court, is established. The same applies to a case where a foreign decree of divorce is sought to be recognised or enforced in England; if it is ascertained that by English law the spouses have not been domiciled in the country whose court pronounced the decree in question, the recognition and enforcement of the foreign decree will be refused by an English court for want of jurisdiction, unless it were valid under the law of the spouses' domicile in the English sense of the term, as will be explained below.

(c) Choice of the proper law and its delimitation..

After the connecting factor has been selected the law applicable to the matter is to be chosen by means of that connecting factor.

Whereas the stages (a) and (b), the so-called primary characterization, are performed in accordance with the lex fori in the wider sense as above explained, the characterization in point (c), the solution of the secondary

characterization is effected according to the chosen law, the *lex causae*, with one exception, that is, where a rule is to be characterised which under the characterization adopted by the *lex fori* falls within the category of procedure; in this event the *lex fori* is exclusively applicable. This applies, for instance, to questions such as concerning limitation of actions for maintenance instalments, for damages, etc. For a discussion on limitation of actions see p.¹⁸⁸....

The court has then to decide how much of that law chosen by means of the connecting factor is to be applied as substantive, and how much of the law of the forum as procedural. See p.¹⁸⁷....

The writers do not agree as to the scope of these two kinds of characterization. Whereas Cheshire includes the question of capacity or formality under the primary characterization; Robertson takes the view that this question is to be dealt with under the secondary characterization.

Illustrative applications of rules of characterization also are the following French divorce-cases.

(1). In the famous case *Levincon* (Cass.May 29,1905) the question arose whether religious rites as to divorce of Russian Jews were a matter of substance governed by national law of the parties concerned or of form governed by the *lex fori*. Under Russian law such matters are of substantive nature while French law regards them as procedural; the French court held that, since Russian law was applicable to the case, Russian rules as to

characterization were to be applied: accordingly, having no power to perform such rites as to divorce as the Russian ecclesiastical courts could, the court dismissed the suit.

(2). A French court took the opposite view in the case Seine Tr. February 15, 1922, Clunet 1922, p. 396 in which the court granted a divorce to Polish citizens domiciled in Paris and married in Belgium, in spite of the fact that marriage was void for lack of a religious solemnisation required by Polish law, and that the latter forbids divorce between a Catholic and a Jewish spouse.

As under French law religious disability is deemed to be of procedural nature, that decision is in accordance with the rules stated above whereunder the rules of the lex fori as to characterization are to be applied to such cases.

The reason given by the French court for that decision was that the national (Polish) law was repugnant to the Public policy of French law and must therefore be disregarded.

The English writers Dicey and A.A. Robertson hold that the law selected for the determination of the principal matter should equally control the secondary matter, although some English decisions are the other way. The correct answer seems to be to follow a middle course, namely, that the solution depends also on the nature of the secondary matter itself; matters of marriage and divorce, for instance, are of so important a character

with regard to the public interests inherent in them that they

3. The preliminary question.

In the course of the process of characterization of a jural matter after the conflict rules as to choice of law have been selected, sometimes a question of a secondary jural matter happens to arise upon which the solution of that principal jural matter depends. It is to be noted that the "secondary" matter concerns a subject matter that is also governed by its own conflict rules in the different systems of law; but since the secondary jural matter has in the case supposed subsequently arisen, while the characterization of the principal matter has taken place, the question arises which law is to govern the secondary matter, the law that has been selected with regard to the principal matter or the law to be selected with regard to the secondary matter by its own rules of conflict of laws.

Among the German writers on this subject Melchior and Wengler take the view that the law which governs the principal matter also applies to the secondary matter while Raape takes the opposite view.

The English writers Cheshire and A.H. Robertson hold that the law selected for the determination of the principal matter should equally control the secondary matter, although some English decisions are the other way. The correct answer seems to be to follow a middle course, namely, that the solution depends also on the nature of the secondary matter itself; matters of marriage and divorce, for instance, are of so important a character with regard to the public interests inherent in them that they

cannot be made subordinate to the rules, for instance of succession, which are of merely pecuniary character. The preliminary question is also a problem of the renvoi in the wider sense because there is a similar reference to the foreign law, yet it differs there-from in that the reference is not made to the same principal question but to the secondary one. In *Shaw v. Gould* (1868) LR 3 HL 55 in which a Scottish divorce was the preliminary question to a principal question of the legitimacy of children born from the second marriage, the court held that the conflict rules as to divorce and not those as to legitimacy control the secondary question; although the second marriage was valid according to the law of the domicile of the second husband, the children were adjudged illegitimate, since the preceding Scottish divorce was held invalid by English law. The same rule was applied in *In re Stirling* (1908) 2 Ch 344. No doubt about the solution of such preliminary questions can, of course, arise when the law ordains that specific rules are to control them. See the case of *In re Askew* (1930) 2 Ch 259 referred to below on discussing renvoi. The facts of the case are as follows: By an English marriage settlement the husband reserved the right to revoke the settled trusts and make a new appointment if he married again. Then in 1911, he acquired a German domicile and after having procured a divorce, he married another woman with whom he had an association some time before; a daughter was born to them before the divorce. In 1913 he exercised his power of appointment in favour of that daughter. The proceedings

taken at his death in 1929 to test the validity of that appointment turned upon the point whether the child could be deemed to be his legitimate daughter. Since by sec.8 of the Legitimacy Act 1926 the question of legitimation of a child by virtue of a subsequent marriage is governed by the law of the child's domicile at the time of the marriage, the English court, holding that it was bound to decide the case as a German court would, found that German law would refer the matter to the national law i.e. English law, which in turn would refer back to the German as the domiciliary law, accepted that remission and applied German law. Since by German law legitimacy per subsequens matrimonium is recognised, the daughter was deemed to be legitimate and the appointment therefore valid.

Chapter IV.

The Doctrine of Renvoi (Remission).

(I). In general.

*See Bell
at intro
2. 206*

As will in detail be explained below, there are under the different systems of law three principles governing the choice of law as to divorce, that is to say, as to the question (1) whether a divorce is admissible at all, or (2) if so, upon what grounds and under what circumstances it is obtainable.

a) Under the law of legal units based upon the principle of domicil. (those questions (1) and (2) are governed both as to their own citizens and as to the foreigners domiciled within their territory by the *lex fori* ; this rule obtains in the Anglo- American law systems.

b) Under the law of legal units based upon the principle of nationality, the above questions (1) and (2) are controlled by the national law of the individuals concerned ; this is the rule under French and Italian law.

c) There are, lastly, some legal units under whose laws some kind of a combination of the principles of domicil and nationality controls one of the questions (1) and (2).

Thus under German law art. 17 (IV) of the Introductory Statute to the Civil Code the question (1) is ruled by

both the lex fori and the national law of the persons concerned while question (2) is controlled by the national law of those persons.

Under Swiss law, on the other hand, question (1) is governed by both national law and lex fori (7 h I of the Federal law of 1891 as amended by the Final Title to the Swiss Civil Code), while question (2) is controlled by the lex fori. (7 h III l.c.)

Art. 53,
par 7 h

II). Where then a court of one of the legal units is dealing with a divorce matter containing a foreign element, it is often required by the rules of conflict of laws to apply the law of some other legal unit. There arises, however, the question whether by the "law of the legal unit" is meant the internal law of the unit exclusive of its conflict rules or the internal law of that unit including its conflict rules.

(A) The method of approach to this question may be threefold.

A(1). The French method.

Where, for instance, a French court, on dealing with a divorce matter of U.S.A. citizens domiciled in France, is by its law, based upon the principle of nationality, required to resort to the law of a legal unit of the American Union in order to decide the case, will find that the law of that legal unit refers back to the law of France as the domiciliary law which, by the conflict rule of the American unit, governs questions of status. The French court will then accept this reference back to its law and decide the case by applying internal French law.

The reason given for the application of this method of the so called "acceptance of the renvoi (remission) " is that, since the reference to the law of the second legal unit (American unit) did not procure a way for the solution of the question, the reference back to its own law is to be accepted and its own internal law applied to the decision of the case in dispute.

The vast majority of French writers on this subject reject the renvoi, but the opinions of the courts are the other way. The doctrine of the renvoi was applied by French courts, for the first time, to the Forgo case, finally decided in 1882 (Cass. June 24. 1878. D 1879,1,56; Cass.Febr.22 1882, S 1882,1,393).(10 Clunet 1883,p 64).

Another argument for the method of approach to the problem, resulting in the application of the internal law of the forum to the case supposed is as follows : From the reference by the French courts to the law of a legal unit of the American Union, (by "law" , as above stated, is meant the law of that American legal unit in its totality, i.e. its internal law plus its conflict of laws rule as regards divorce matters), it appears that the law of the American legal unit has not any rule relating to divorce matters of its n a t i o n a l s, since its basis of such matters is the principle of d o m i c i l. As, thus, the foreign law to which reference has been made does not afford any solution of the case supposed for want of any respective rule, there s, by the view of the supporters of this theory, nothing left but to decide the case by applying the law of the

forum; this is called the desistment theory.

A (2). The American method.

Let us suppose a court of a State of U.S.A., dealing with a matter containing a foreign (French) element, is required to refer to French law. The American court takes the view that this reference to French law means the internal law of the foreign (French) legal unit exclusive of its conflict rules and consequently applies the foreign (French) internal law in that narrow sense.

A(3). The English method.

Where, lastly, an English court which is seized of a jural matter containing a foreign, for instance, French element, is required by the English rules of conflict of laws to refer to French law, there arises the same question whether or not that foreign (French) law governing the case is to be administered in its totality i.e. including its rules on conflict of laws. The English courts take the view that they are required to administer French law in such a way as a French court would do, that is to say: Whether a French court by reason of the theory of renvoi adopted by French law administers French internal law or would decide the case by applying English internal law, because it follows the American method explained in point A (2) above, in either event, the English court would dispose of the case in the same way as if it were "sitting in France." The three leading cases of this English method are: In re Annesley (1926) Ch. 692, In re Askew (1930) 2 Ch 259, In re Ross (1930) 1 Ch 377; reference has been made in the two former

Dacey
822

cases to French and German law respectively, which both recognise the doctrine of renvoi, and the solution resulted in applying French and German internal law respectively; in the case *In re Ross*, where it was referred to Italian law, to which the doctrine of renvoi is unknown, the English court applied its own internal law.

In re Ross has been followed by a recent decision *In re O'Keefe*, *Poingdestre v. Sherman* (1940) Ch. 124.

B. German law has adopted the renvoi theory in part. By art. 27 of the Introductory Act to the Civil Code (E.G.B.G.B.) in respect to certain matters specified by articles cited below provided that, if under the conflicts rule of a foreign legal unit whose law is declared by those articles cited below to be controlling, the German laws are to be applied, the latter laws have application.

The articles mentioned in article 27 are: art.7 (1) (concerning capacity,) art.13(1) relating to marriage), art. 15(2) concerning marital property), art.17(1) relating to divorce), art.25 (concerning succession).

Article 17 (1) referred to above has the following wording: "as to the dissolution of the marriage the laws of that state are applicable, to which the husband belongs at the time of the commencement of the action."

Thus by virtue of these statutory provisions the doctrine of renvoi applies in part to matters of divorce in Germany.

The provision of article 27 of the Introductory Act to the Civil Code was made with the express intent to reduce

thereby the number of conflict cases resulting from the conflict of laws, especially from those as between the principle of nationality of German law and that of domicile of other systems of law.

As regards property relations of spouses, succession, capacity and marriage other connecting factors are the potential elements that may give rise to the renvoi to German law and thus make it applicable according to article 27 of the Introductory Statute to the German Civil Code. For those articles cited above provide that, in general, the law of nationality is to govern the questions just specified; where however the law of nationality for some reason refers the matter back, the German internal law will be applied to those questions. The adoption of the principle of renvoi in those cases results, therefore, in the substitution of the lex domicilii for the law of nationality with regard to matters of divorce. Hence by this acceptance of renvoi ordained by article 27 in connection with article 17 (1) of the Introductory Act of the Civil Code from a legal unit of the Anglo - American systems based upon the principle of domicile as to questions of divorce, German law is to be applied to matters of divorce of British and U.S.A. subjects domiciled in Germany, while such matters of French or Italian citizens domiciled in Germany are governed by their national law since it is based on the principle of nationality.

(III). Renvoi of the second degree or Transmission.

Where an English court which is seized of a jural matter involving a foreign element is required by its rules of conflict of laws to refer to a foreign law in the wider sense, i.e. including also the respective foreign conflict rule, the latter law sometimes happens to refer the matter on to the law of some third legal unit; this reference on to the law of a third legal unit is called transmission or renvoi of the second degree (German: Weiterverweisung).

One of the most important progressive rules of English conflict of laws as to divorce has been established through the English method as to renvoi of the second degree, namely, the rule laid down in *Armitage v. Attorney-General* (1906)P 135 where, under the validity of a foreign decree of divorce is to be recognised by English courts even if rendered by an incompetent foreign court, provided that the decree is deemed valid under the law of the domicile of the spouses concerned.

For detailed discussion of this rule is hereby referred to p 44.

Reference may now be made to the illustration of a renvoi of the second degree in *In re Trufort, Trafford v. Blanc* (1887) 36 Ch D 600, a case concerning the validity

of a Swiss judgment: Since under English law jurisdiction as regards the movable estate of a deceased exists in the courts of his last domicile, the English court with regard to the testator's last domicile in France referred to

French law and found under the latter law the matter referred on to the national law of the testator, i.e. to Swiss law. Accordingly, the English court held that the judgments of the Zuerich Federal District Court and of the Zuerich Court of Appeal in that matter were deemed to be final and conclusive and therefore binding upon it.

(IV), In order to find the legal basis of the renvoi, if any, one must seek to ascertain the nature of the rules of conflict of laws.

a) In the view of the "internationalists" the rules of conflict of laws are part of the law of nations; the law of nations determines the limits of the legislative power of the states. This power extends to all persons, things and legal relations subject to it under the law of nations.

The rules of conflict of laws constitute a whole universally operative system, sufficient to solve all questions which contain a foreign element. By this view the system of private international law is founded upon a supernational basis and is binding upon the states, viz. there exists an international duty of applying these rules.

b) The opposite view rejects the theory that the rules of conflict of laws are part of the law of nations and that the system of these rules is binding upon the states. Under their view the legislative competency, viz. the law-making power of the states as regards conflict rules, is unrestricted and each state may make provisions relating

to this subject at pleasure. This view regards the rules of conflict of laws as part of the municipal law of the relative state derived from its sovereignty and by this branch of the municipal law the conditions are determined upon which foreign law is to be applied. According to the view of the "internationalists" the theory of the renvoi is recognised with regard to the universally binding power of private international law upon the states and their courts respectively ; and the reference to a foreign law means reference to the totality of that law, thus including the system of Private International Law. If the purely internal law of the foreign legal unit, i.e. exclusive of the foreign conflict rules, be applied, the decision would be wrong, because a law was applied to the case, that according to the foreign conflict rules must not be applied to the case in litigation. The opposite school, on the other hand, rejects the doctrine of renvoi on the following reasoning:

a) The definite conflicts rule of the forum must not be rendered conditional upon the corresponding conflicts rule of the foreign law, demanding renvoi. Where the law refers a matter to a foreign law, the foreign internal law only concerning the point in question is to be applied, and the foreign conflicts rule is to be disregarded.

b) As there is no universally recognised system of private international law, founded upon a supernational law, there does not obtain either an international duty of applying

foreign law and accordingly no such duty of regarding the remission or transmission as binding.

c). The function of the conflicts rule of the forum is, by applying to the case in dispute and by referring to the foreign law, exhausted with regard to its selective character and cannot be invoked a second or third time by means of the renvoi. (remission).

d). The application of the renvoi doctrine produces uncertainty in law, because the matter depends often on the doubtful and conflicting evidence of foreign experts.

e). The renvoi is, as a rule, unworkable, because there is often an endless chain of references.

(V). Having given the above survey of the views on this subject I now pass to the determination of the legal basis of the renvoi.

Although the rules of conflict of laws cannot be said to be derived from the law of nations (public international law) or even to be a part thereof, yet it is undeniable that there is in many a respect some connexion between them.

First of all, there exists a series of bilateral and multilateral Conventions treating of some questions of private international law.

In addition, there are various international tribunals of justice which deal with jural matters to which the rules of conflict of laws have to be applied.

Those rules and decisions, founded upon public international law, are first of persuasive character and become eventually binding upon the courts which then

extend their application beyond the purview of the treaties to analogous factual situations.

This applies also to a number of rules of conflict of laws which have been in this way, i.e. by means of the communis opinio of the courts of diverse legal units, universally recognised.

The objections, referred to in point (c) and (d), seem to be erroneous. From the selective character of a conflicts rule of itself, does not follow that the function of this rule is exhausted by the first reference. 26/

As to the further arguments put forward against the doctrine of renvoi it may be stressed that there now exists a comprehensive literature on both international private law and comparative law by which the attitude of the courts towards the question of renvoi can easily be ascertained, and the experts on this subject will assist the court in arriving at the right view on this point.

At any rate, it cannot be denied that in most cases the application of the method explained in point A (3) above, by the English courts, shows so far that it promotes certainty in law ; for by this method a party invoking a foreign court can hardly recover a judgment different from that which an English court would render by applying its method. A further advantage consequential to the precedent is that a person who obtains a judgment based on renvoi from a competent court of one of the countries involved in the renvoi would not find any difficulty in enforcing it in the other country, since the judgment would have been pronounced according to the law pre-

prevailing in the latter country.

(VI). The foregoing observations were necessary before attempting to find the correct answer as to the legal basis of the English method.

(1). On deciding a case, for instance, a divorce case, there is not only the particular provision of the divorce law to be considered but also the fundamental rules as to interpretation, capacity and all the other general rules of the system, since they are presuppositions for the correct construction of the provision and its application to the case.

Similarly, in the case of a reference to a foreign law all those fundamental rules and the rules of conflict of law, which combined form the general part of the foreign law system, are equally to be taken into consideration, as the specific provision of the foreign municipal law depends upon them. That specific provision can fully be understood only in connection with those general rules of the foreign law; for it applies to an ordinary case only and cannot be deemed applicable to a case containing a foreign element without having regard to the relative rules of conflict of laws.

Thus the doctrine of renvoi is a consequence of that view that the private international law is part of the private municipal law.

Pillet, an opponent of the doctrine of renvoi, equally points out that it is only the latter view as to private international law which leads to the adoption of the doctrine of renvoi; he also opposes this view and is

of opinion that private international law is part of the law of nations. (Pillet, Principes de Droit International Privé (1903) page 166).

Another foundation of the doctrine of renvoi is the vested rights theory ; for the detailed discussion of this theory may be referred to p.

Here it may only be noted that the existence of a vested right can only be ascertained by reference to the law of the country where it had its origin, and thus, in case of a foreign judgment that is conclusive of the right, it decided, this vested right arising from that judgment can equally only be ascertained by reference to the law of the country whose courts pronounced it.

Crowdson v. Leonard 4 Cranch 434, Dalrympe v Dalrympe 2 Hagg. Consist. 54. In logical consequence of the rule of the Anglo-American law systems whereunder domicile is the criterion as to jurisdiction and choice of law in matters of divorce, by application of the doctrine of renvoi in cases where a court other than that of the domicile of the spouses pronounced a decree of divorce, the law of the spouses domicile is applied to the question of the validity of that decree.

Armitage v. Attorney General (1906) P 135 and the cases cited above. Hence it is the municipal law that demands the application of the foreign law and by the English method the courts have to apply that doctrine whenever the foreign law to which reference has been made adopted this doctrine.

English courts applying the method above described

followed as ever their own conceptions of utility and justice and not some "inconvenient doctrine" as the opponents thereof assert ; for at the time when to the case of *Collier v. Rivaz* (1841) 2 Curt. Ecce 855 the first time the renvoi was applied there was not any theory of renvoi known.

For all these reasons every objections to the general admissibility of the doctrine of renvoi seems to be erroneous; this doctrine is a just and practicable method of the solution of questions as to conflict of laws.

VII. There are, of course, cases in which the doctrine of renvoi has no application.

(1). Since the municipal law of each legal unit has to determine the scope of the applicability of its rules of conflict of laws, it may make a statement to the effect that its reference to the foreign law of a legal unit means the reference to the purely internal law exclusive of the conflict rules of the latter law and may in this way expressly or impliedly exclude the application of the renvoi altogether or in part only. The courts are thus required simply to follow such provisions of the law.

(2). Further where the same connecting factor and the same choice of law rule are to be applied under the law of the forum as by the foreign law to which reference is made, there is no room for the application of renvoi.

(3) Again there may be some cases in which the renvoi might lead to an endless chain of references to and back, as for instance, in the case where both the *lex fori* and

the foreign law to which reference is made require the application of the doctrine of renvoi. The course of such references could be stopped at the first remission or the first transmission where the law to which reference had been made would for reasons stated in points (1) and (2) above refer the matter to the purely internal law. Otherwise such a case must be treated as if the proof of the foreign law which had to be applied cannot be established and English internal law is to be applied to the case according to the decisions in *Brown v. Gracey* (1821) Dow & Ry NP 41 and *Smith v. Gould* (1842) 4 MoPC 21, *Lloyd v. Guibert* LR 1Q B 129 cited by Westlake, 5, ed.p. 423; in those decisions the rule has been laid down that where the proof of foreign law fails, English law is to be applied.

(4). The opponents of the doctrine of the renvoi point out that the English method leads to an endless chain of references and is therefore impracticable where the foreign law to which reference has been made adopted the same method as the English courts have. The solution of the question may be found as stated above in point (3). The same result can be arrived at on the following reasoning; The view taken in some decisions on the subject denies that renvoi is part of English law. The attitude of the English courts towards this question is, in fact, noncommittal and depends solely upon the foreign law to which English law refers the particular case containing a foreign element. Hence if a foreign law applied the same

approach to the subject as English law, the renvoi doctrine consequently must be deemed to be no part of that foreign law as it is none of English law, according to decisions above mentioned. Accordingly, such a case is similar to that we dealt with in discussing *In re Ross*, in which case it was referred to Italian law which does not accept renvoi.

(VIII). (a) The English method explained above is applied also to the question of the validity of foreign divorce decrees.

Under the English choice of law rule the test of the validity of a foreign decree of divorce is the law of the domicile of the spouses at the date of instituting divorce proceedings, thus the English courts refer in cases where a decree has not been rendered by the court of the domicile to the law of the foreign domicile of the spouses, in other words to the law which the courts of the domicile would administer if the question as to the validity of such decree arose before them.

This is a reference to the law of the domicile of the spouses in its totality, viz. to the municipal law including the rules of conflict of laws, thus if under the latter the decree of divorce is valid, the English courts equally recognize its validity, although that decree has been pronounced by a court that has under English law no jurisdiction to pronounce that decree and the ground of divorce is recognised neither under English internal law

nor under the internal law of the domicil. This method of deciding the question of validity of a divorce decree in the same way as the courts of the domicil would, was first applied to the case of Armitage v. Attorney General (1906) P 135 in which Sir Gorell Barnes P. pointed out as follows :

" The only question that remains for consideration
" is the question of English law. Are we to recognize
" in this country the binding effect of a decree
" obtained in a State in which the husband is not
" domiciled, if the Courts of the State in which he
" is domiciled recognized the validity of that
" decree? This point has not been distinctly de-
" termined in the Courts of this country. The
" nearest decision is to be found in the somewhat
" analogous case of Harvey v. Farnie (1882) 8 App.
" Cas. 43, in which it was held

'that the English Courts recognise as valid the
'decision of a competent foreign Christian tribu-
'nal dissolving the marriage between a domiciled
'native in the country where such tribunal has
'jurisdiction, and an English woman, when the
'decree of divorce is not impeached by any species
'of collusion or fraud. And this, although the
'marriage may have been solemnised in England and
'may have been dissolved for a cause which would
'not have been sufficient to obtain a divorce in
'England.

"The evidence in the present case shows that in the
" State of New York the decision of the Court of
" South Dakota would be recognised as valid. The
" point then is this : Are we in this country to
" recognise the validity of a divorce which is re-
" cognised as valid by the law of the domicil? In
" my view, this question must be answered in the
" affirmative. It seems to me impossible to come to
" any other conclusion, because the status is affected
" and determined by the decree that is recognised in
" the State of New York - the State of the domicil -
" as having affected and determined it. "

(b) I now pass to some other decisions of English courts concerning the validity of decrees of divorce which are applications of the rule stated above under point (a).

(1). The facts in Cass v. Cass (otherwise Pfaff) (1910)

26 TLR 305 were as follows:

A wife after procuring a divorce in South Dakota from her husband who was domiciled in Massachusetts and had received no notice of her suit, married in New York an Englishman, domiciled in England. The latter then petitioned for annulment of that marriage on the ground that his wife's divorce was invalid and therefore the second marriage void, since the former husband was living at the date of the second marriage. The evidence showed that the divorce was invalid under the law of the domicile i.e. Massachusetts. The court held that it should determine the validity of the divorce as a court of Massachusetts would, and accordingly declared that decree invalid.

(2). Shute v. Shute (1930) Times March 11.

An English woman had been domiciled with her husband, an Englishman, in England. Over 20 years after the marriage she went to California and obtained a divorce there ; but without domicile, on the ground of non-support. The former husband petitioned for divorce in England and the court held, on the same reasoning as above, the Californian decree invalid.

(3). Stirling v. Stirling (1908) 2 Ch. 344.

In that case the wife procured a divorce in North Dakota from her husband, domiciled in Scotland, on grounds that were neither under the law of Canada, where the marriage took place, nor under the law of Scotland, recognised as sufficient to obtain a divorce. Since that decree was not recognised as valid under Scottish law, the English court equally held the decree of divorce invalid.

(4) Clark v. Clark : (1921) T.L.R. 815.

The wife domiciled in New York, having married in England a husband of the same domicile, obtained in France a decree of divorce which was binding between the parties in the State of New York. She subsequently filed a petition for restitution of conjugal rights in the English court. She did not appear at the hearing and the court having found, on expert evidence, that the French decree of divorce was valid in the court of the State of New York, dismissed the petition.

(c). U.S.A. Method.

By this method the forum's conflict of laws rule is simply a reference to the appropriate internal law of the foreign legal unit.

The first case decided in that way was the case of Talmadge 109 Misc. 696; 181 NY. 336, 1919. This was a case concerning succession.

In divorce cases, however, American courts apply the same method as the English courts in the case of Armitage v. Attorney General. See the cases :

Ball v. Cross 231 NY. 329, 332; 132 NE 106, 107 (1921).

Dean v. Dean 241 NY. 240; 149 NE 844 (1925).

Powell v. Powell, 211 App. Div. 750; 208 NY Supp. 152 (1925)

Lando v. Lando, 112 Minn. 257; 127 NW 1125 (1910

(a case as to the validity of a marriage).

The Restatement of Conflict of Laws, 1934, which is of persuasive character only, rejects the doctrine of renvoi subject to the qualification contained in § 8:

" (1). All questions of title to land are decided in accordance with the law of the state where the land is, including the conflict of laws rules of that state.

(2). All questions concerning the validity of a decree of divorce are decided in accordance with the law of the domicile of the parties, including the conflict of laws rules of that state."

There appears recently to be a trend in U.S.A. to apply the doctrine of renvoi also to contract cases.

See the case University of Chicago v. Dater, 270 NW 175 (Mich. 1936). The Supreme Court of Michigan found that, by the Michigan choice of law rule, the matter was referred to the law of Illinois, which referred it back to Michigan law. The Supreme Court of Michigan accepted the remission and applied Michigan law.

(d) French courts apply the doctrine of renvoi to all branches of law, particularly to suits for divorce brought before them by foreigners domiciled in France.

Under French law which is based on the principle of nationality the national law of the foreigners concerned applies in general to the question whether divorce is admissible and on what ground it is, yet in case of application of the doctrine of renvoi French law alone controls these questions.

Tr. Seine, Febr. 11, 1913, Clunet 1913, 1233 in which case renvoi was applied to a divorce between British subjects; Lyon, July 24, 1898, Clunet 1899, 569.

Paris, March 15, 1899, Clunet 1899, 794.

Rennes, July 24, 1923, Gazette Palais 1923, 2, 545.

For the details reference is made to p. 170.

(e). Under German law, as stated above, the statutory renvoi applies to causes of divorce where the national law of the spouses concerned refers the matter back to German law. (Art. 27 of the Introductory Act to the Civil Code).

It was doubtful whether this statutory provision includes also transmission ("Weiterverweisung") ; the decision of the Second Senate of the German Imperial Court of November 30, 1906, RG. 64,393, was in the affirmative and the Court held that on administering foreign law its conflict rules must be also be applied because it was not infeasible to apply "fragmentary" parts only of the proper foreign law to the case in litigation.

For details reference is made to p.177.

The doctrine of renvoi is not recognised by Italian law; see decision of Naples June 5, 1920, Revue de droit international privé 1921, pag. 269.

Renvoi
4 Rück-
verweisung
See Einführung
guts &
3.9.8. art.
27 K
Warneke's
note

Chapter V.

Domicil and nationality.

In general.

Among the great number of connecting factors ~~used by~~ the diverse laws on conflict of laws for the determination of jurisdiction in matters of divorce and for the selection of the law governing them there are both legal notions and facts, namely: as : domicil, nationality, residence, place of celebration of marriage, place where the cause of divorce has occurred, etc.

The legal conceptions of domicil and nationality are of the utmost importance to this subject. The essentials of these legal conceptions, domicil and nationality, are not uniformly fixed, as will be shown below.

The use of those two notions as connecting factors carries with it some advantages and disadvantages:

(1) By the principle of domicil all persons domiciled within the respective legal unit are subjected to the law thereof, whereas, in case of nationality being the test of the choice of law, different national laws have to be applied according to the nationality of the individuals concerned .

(2) By the use of domicil as test, the difficulties are also avoided arising out of the principle of nationality with regard to persons of double or more nationality and apatrids; those difficulties are increasing :

(a) since the modern legislation of states on nationality grants the married women nationality different from that of their husbands, by allowing the married women to retain their original nationality on marriage

or to acquire a different nationality during marriage;
(b) There are naturalisation laws permitting expatriation before the bond of allegiance to the original state has been severed ; this carries with it that a person may be of double nationality while deprivation of nationality according to statutory provisions of some states or the renouncement of nationality creates the status of apatrides. Domicile, as a subsidiary test is sometimes applied to questions of status of stateless persons under the laws of those countries which generally recognise nationality as test of such questions.

(3) The disadvantage of domicile being such test is that the citizens of the relative legal unit by acquiring a foreign domicile, become subject to an alien law.

(4) A disadvantage common to both these connecting factors is this, that the individuals concerned can change the domicile and nationality respectively. Yet since the trend of post-war legislation is to render the naturalisation of foreigners most difficult, a further disadvantage of domicile may be that it can be ~~easier~~ *A more easily* changed and thus there is more opportunity for a husband to change his domicile to the prejudice of his wife.

So now a combination of those two tests provided by the laws of Germany and Switzerland seeks to avoid the difficulties outlined above - see p.33..

In the Anglo- American systems of law domicile is the sole test in matters of divorce both as regards jurisdiction and choice of law, as will be discussed in detail below, p.163,235.



On the other hand, in those countries which adopt nationality as test with regard to choice of law in matters of divorce the national law of the individuals concerned is to be applied. There are two exceptions to this rule :

(1) Where ~~it is repugnant~~ to the public policy of the lex fori, the national law is not applicable; thus Italian Courts eventually refused to grant divorce a vinculo matrimonii to foreigners as being against the fundamental principles of Italian law that does not recognise divorce a vinculo matrimonii :

(2) Where the law of the legal unit to which the foreigner belongs adopts domicil as a test of choice of law and the lex fori adopts the doctrine of renvoi ; hence French Courts refer in cases of divorce of U.S.A. citizens domiciled in France, to the law of U.S.A. ,i.e. of the relative State of the American Union as the national law which refers the matter back to French law as the domiciliary law. The French courts then accept the renvoi on the reasoning that a refusal to do so would mean a denial of justice.

That the difficulties arising from the principle of nationality being the test of choice of law in matters of divorce appear to be increasing with regard to the general trend towards equality of married women in questions of nationality is shown by the respective provisions cited presently:

(1) The former "classic" principle that the wife unconditionally loses her nationality by marriage to a

foreigner and acquires that of her husband, obtains in Germany (Law of Nationality, July 1913 ss6, 17 (6).

(2) Some nationality laws provide the so- called "negative" clause i. e. the conditional rule under which the woman loses her nationality only in case she acquires the nationality of her husband, as in Great Britain (Nationality Act, 1914, sec. 10 as amended by Acts of 1918 and 1922), in Italy (Law of Nationality Act 1912, 1922). in Switzerland (Swiss Constitution Art. 54, IV. and Civil Code Art. 16 .

(3) Finally, there is a third type of laws, of nationality, which contain the so- called " positive" clause, by which it is declared that marriage to a foreigner does not affect the nationality of a woman, except by an express declaration by her to the contrary. Thus under French law, art. VIII of the Nationality Law of August 10. 1927, a French woman marrying a foreigner maintains her French nationality unless she expressly declares a wish to acquire his nationality in accordance with the provisions of the national law of the husband; she loses French nationality if the spouses fix their first domicile out of France after the celebration of the marriage and if the woman necessarily acquires the nationality of the husband, in virtue of his national law.

In U.S.A. under the so- called Cable Act of Sept. 1922 s. 3(a) equally the citizenship of a woman marrying a foreigner remains unaffected unless she makes a formal renunciation of it before a court having jurisdiction over naturalisation of foreigners.

As a rule, the nationality of a wife is not affected by the dissolution of the marriage. This is the rule in Great Britain (s.7a 1.g.).

Under American Cable Act of 1922 a wife who has acquired American citizenship by marriage retained it, after termination of the marital status, if she continues to reside in USA, unless she formally renounces it; residing abroad, she may retain her American citizenship, by registering as an American citizen before an American consul within one year after termination of the marriage. In Germany the law provides for the unconditional loss of nationality by the wife upon loss of nationality by the husband, whereas Italian and Swiss law provide that the wife loses her nationality only if she acquires a new nationality with her husband; under Italian CC art.11 she may retain her Italian nationality if she continues to reside in Italy.

Further, in Great Britain, under the Nationality Act as amended by Act of Nov. 17, 1933 it is provided that the wife's loss of nationality through her husband is conditional, upon that she failed to elect, under the form prescribed by the law, to retain her original nationality. Finally, in U.S.A. it is provided, by implication, under the Cable Act of 1922 , s.3. (a) as amended by the Act of March 3, 1931, that a change of nationality by the husband does not affect the nationality of the wife.

*Should give
citation in English
form*

English Common Law on Domicil.

" Domicil is impossible of definition," said Sir George Jessel in ~~Domeo~~ ~~v.~~ ~~Geogfegan~~ (1878) L.R. 9 Ch.D.441,456. *used/ h/*

The common law theory of domicil distinguishes between domicil of origin and that of choice. The former is involuntarily acquired, (by operation of law) whereas the latter is voluntarily adopted. Since by that theory there can be no person without a domicil, everyone must have either a domicil of origin or one of choice. But no person can at the same time have more than one domicil. An independent person of full age and capacity may change his domicil by his own act; a dependent's domicil can be changed only by the act of the person on whom he or she is dependent.

Domicil of origin. Every person has by law a domicil of origin. It may however be some time in abeyance as will be explained below, but it can, at any rate, be ascertained by the following rule: The domicil of origin of a child who descends from lawfully married parents is determined by the domicil of his (her) father. The domicil of origin of a posthumous child is the domicil of the mother; the same applies to an illegitimate child. *ens/*

A foundling has the domicil of origin in the place where he or she was born or found. *Lauderdale Peerage* (1885) 10 App.Cas/ 647, 692.

Abandonment of the domicil of origin.

A domicil of origin cannot be destroyed by the will or act of the party, as Lord Westbury put it in

Udny v. Udny (1869) L.R. 1 Sc. Ap. 457:

" It (the domicil of origin) may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the status civilis of the criminal, but it cannot be destroyed by the will or act of the party."

A domicil of choice can be acquired by every independent person of full age and capacity. For acquisition of a domicil of choice two essentials are required, a factual and an intentional one, that is to say, the establishment of a new actual residence (factum) with the intention to remain for an indefinite time (animus manendi) ; if such a domicil of choice is abandoned without a new domicil of choice being established by both elements mentioned above, the domicil of origin revives.

Proof of change of domicil.

Domicil is as stated above, the country where a person has established his residence with the intention to remain there for an indefinite time. A person may be domiciled in a country although having ~~no~~ special place which can be termed his home. From the decisions Bell v. Kennedy (1868) 1 Sc.App. 307. Winans v. Attorney General (1904) A.C. 387 and Ramsay v. Liverpool Royal Infirmary (1930) A.C. 588 it is apparent how difficult it is to discharge the burden of proof as to the fact that the domicil of origin has been superseded by a domicil of choice.

In the decision of Winans v. Attorney General it was laid down that " it must be proved with perfect clearness and

Udny v. Udny (1869) L.R. 1 Sc. Ap. 457:

" It (the domicil of origin) may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the status civilis of the criminal, but it cannot be destroyed by the will or act of the party."

A domicil of choice can be acquired by every independent person of full age and capacity. For acquisition of a domicil of choice two essentials are required, a factual and an intentional one, that is to say, the establishment of a new actual residence (factum) with the intention to remain for an indefinite time (animus manendi) ; if such a domicil of choice is abandoned without a new domicil of choice being established by both elements mentioned above, the domicil of origin revives.

Proof of change of domicil.

Domicil is as stated above, the country where a person has established his residence with the intention to remain there for an indefinite time. A person may be domiciled in a country although having no special place which can be termed his home. From the decisions Bell v. Kennedy (1868) 1 Sc.App. 307. Winans v. Attorney General (1904) A.C. 387 and Ramsay v. Liverpool Royal Infirmary (1930) A.C. 588 it is apparent how difficult it is to discharge the burden of proof as to the fact that the domicil of origin has been superseded by a domicil of choice.

In the decision of Winans v. Attorney General it was laid down that " it must be proved with perfect clearness and

satisfaction to the court that a person had formed a fixed and settled purpose to abandon his domicile and to settle in the new country. " In the case of *Boldrini v. Boldrini* (1931) 48 T.L.R.94, it was laid down that the Aliens Order 1920 did not prevent an alien from acquiring an English domicile, provided that both essentials animus and factum were established.

It is, however, less difficult to prove that a domicile of choice has been changed. In general, change of nationality of itself is no proof of change of domicile.

Stanley v. Bernes (1830) 3 Hag.Ecc.373.

Effect of change of domicile in matters of divorce.

Where the essentials as to the acquisition of a new domicile of choice (taking up the residence and intention to change the domicile) are proved, the courts will not inquire into the motive. This is definitely settled by the decision of *Drexel v. Drexel* (1916) 1 Ch.251, where Neville held that a husband abandoned his English domicile by residence in France though he had settled there merely to get a divorce.

Scottish Law. Effect of change of domicile.

As the decisions cited above show, the law on domicile is now in Scotland the same as in England. If a change of domicile takes place after committing a matrimonial offence domicile is not lost: *Redding v. Redding* (1888) 15 R 1102 (fraudulent, malicious change), *Jack v. Jack* (1862), 24 D 467. But it is now^a settled a rule of Scottish law that the courts do not make inquiries into the motive of the change of domicile since the decision of *Carswell v. Carswell* (1881) 8 R 901 in which case it was held that

a Scottish court would grant a decree in favour of a husband who has become domiciled in Scotland for the purpose of obtaining divorce from his wife on some ground which is not admitted as a ground of divorce by the law of his former domicile.

This was followed by *Stavert v. Stavert* (1882) R 519 , *Steel v. Steel* (1888) 15 R 896,904; *Ross v. Ross* (1940) S.C. (HL) 1. The decision in *Le Mesurier v. Le Mesurier* (1895) AC 517 has not altered the position since the conception of domicile in the strict sense of this term as understood by that decision excludes collusion or fraud.

U.S.A. Law on Domicil.

(A.) Common law doctrine. The common law theory of domicile obtains with some modifications: There is less stress laid upon the requirement of a permanent intention to make a home with regard to the fact that in America the conditions are less stable and permanent. As Parker J. stated it in *Putnam v. Johnson* 10 Massachusetts 488, 501(1813) :

" In this new and enterprising country, it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their view of business and advancement in life ; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain."

In this case it was held that a student in a theological school taking a course, which by its nature came to an end in three years, might nevertheless acquire a domicile in the school.

In *Winans v. Winans* 205 Massachusetts 388 the court found that requirement of "the intention of taking up residence either permanently or for an indefinite time" to be subsisting and decided that the husband who came with his wife to a hotel in Boston and stopped there for a few days while house-hunting and before a house had been chosen, deserted her, had acquired a domicile in Boston. Similarly, it was declared by the court of New Jersey in *Harral v. Harral* 39 N.J. Eq. 279 :

"That place is a domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless and until something which is uncertain and unexpected shall happen to induce him to adopt some other permanent home."

(B). Restatement of conflict of laws.

In the definition of domicile given in the Restatement of conflict of laws it is also mentioned : "an intention to make the new dwelling-place his home."

(C). Statutes

As will be more fully discussed later, the jurisdiction to grant a divorce in U.S.A. is entirely statutory; in these statutes generally residence or domicile is made the basis of jurisdiction for divorce proceedings, but the term "residence" is construed by the courts to be equivalent to the legal term "domicile" in the

American sense of that term, explained above. Thus the courts of New York held in Barber v. Barber 89 Misc.519, De Meli v. Meli 120 N.Y. 485 and the courts of New Jersey in Magowan v. Magowan 57 N.J. Eq. 322 and Harrel v. Harrel 39 N.J. Eq. 279 that "residence" required of the plaintiff by the relative statute is synonymous with "domicil".

U.S.A. Law on change of domicil.

Parties to a marriage frequently change their domicil to another state in order to get there a divorce on a ground that is not sufficient in the court of their previous domicil. In such cases there arises a presumption, that the animus of remaining in the new domicil is not definite, but determinate upon the termination of the divorce proceedings. Hence where parties leave one jurisdiction, and take up a domicil in another, there is apart from the requirements as to domicil set out above, a further essential required, namely, the bona fides of the change of domicil i.e. absolute good faith in the taking up of such domicil and of the animus manendi. There is a general rule, not to grant a divorce unless such domicil has been acquired under circumstances showing sufficient and controlling reasons for its acquisition other than the desire to procure a divorce.

On the other hand, a person may move to another state, in order to avail himself of the laws of that state; the avowed purpose of seeking a new domicil so as to get a divorce there does not show illegality or even impropriety

of motive, although it may well induce the court to require strict proof of domicile in good faith and it must be proved as fully as other material facts are required to be proved. See the decisions *Streitwolf v. Streitwolf* 58 NJEq 563. *Wallace v. Wallace* 65 NJ Eq. 359, *Andrews v. Andrews* 188 US 14.

The Continental Definitions of Domicile.

The following definitions of domicile are given by the statutory enactments mentioned above :

(1). By French law art. 102 Cc:

" The domicile of every Frenchmen, as to the engagement of civil rights, is at the place of his principal establishment." *exercise*

Prior to 1927 a foreigner could acquire a domicile in France only by express governmental authorisation.

(art. 13 Cc). The domicile of a foreigner not having such authorisation has been termed " domicile in fact. "

By the law of August 10, 1927 the article 13 was repealed and since then the difference between " domicile in fact " and " domicile in law " of foreigners has disappeared and the rules concerning acquisition of domiciles by foreigners are now on the same footing as those laid down in art. 102 Cc with regard to the domicile of Frenchmen.

Decision of March 22, 1929, Journal 1930/ 360,
decision of the Court at Pau, March 19, 1934.
Gazette du Tribunaux, April 29, 1934.

(2). Austrian law, Para. 66 (I) of the Jurisdiction Rules runs:

" A person establishes his domicile in the place where he has settled with the intention, provable or inferable from the circumstances, to take up permanent residence there."

(3) German law, art. 7 B.G.B.:

" A person who resides permanently in a place establishes his domicile in that place. "

(4) Swiss law art. 23 Z.G.B. :

" The domicile of a person is established in that place where he or she resides with the intention of remaining there permanently."

From the reasons set out above it may be concluded that the conception of domicile in the continental sense is rather equal to that of residence under common law.

The chief points of difference between the common law theory of domicil and the conception of domicile under the continental systems of law.

Unknown to continental systems of law are :

(1). The legal idea of the domicil of origin which is in abeyance during the continuance of a domicil of choice and which revives when a domicil of choice is abandoned without acquiring another domicil of choice.

(2). The common law rule that no person can at any time be without domicil,

(3) The common law rule that absence of animus revertendi is a condition of the acquisition of a new domicil of choice.

(4). Whereas by common law a person may be domiciled in a country without having a special place that can be termed his home, it is an essential of the notion of domicile in the continental sense to have a special place as permanent home in a country.

(5) Finally, in regard to the common law rule that no person can have at the same time more than one domicile, it is to be observed as follows ;

Under French law (art. 102 Cc) and Swiss law (art.23 II ZCB) the same rule obtains as under common law, whereas ~~by the~~ German and Austrian law are express statutory enactments that a person may ~~also~~ have two or more domiciles. *there*

(6) Whereas, in the case of changing the domicile of choice until both elements, the factual and the intentional, are complied with, there is under the continental laws, the presumption of continuance of the previous domicile of choice; no such presumption prevails under common law, at least under English common law, where under in such case the domicile of origin revives. The common law, the French law, and the Swiss law differ from the German and Austrian law in that under former laws no person can have at the same time more than one domicile, whereas, by the latter laws, a person may have his domicile simultaneously in several places.

Married women's separate domicile.

(1) English law. The domicile of a married woman is by operation of law dependent upon her husband's domicile. For the legal fiction of unity of husband and wife reference may be made to p. 75.

Under English common law the rule still obtains that a wife's domicile always follows that of her husband till divorce a vinculo matrimonii; even judicial separation does not affect the question of her domicile.

See Warrender v. Warrender (1835) 2 Cl & F 488;

Dolphin v. Robbins (1859) 7 HL C 390

and Attorney General v. Cook. (1926) AC 444.

On the attempt to alter the position of married women in this respect and on the final rejection of those attempts by the decisions in H.v.H. (1928) P 206 and Herd v. Herd (1936) P 205, see pp.238.

Without altering this legal position sec. 13 of the Matrimonial Causes Act. 1937, provides for some mitigation of the hardship, arising out of this inability of the wife of acquiring a separate domicile from her husband, but this only for the purpose of an action for divorce; this provision lays down an exception to the principle of domicile as the sole test of jurisdiction in proceedings for divorce. See pp.239..

(2) Scottish law. Scottish Law does not recognise a separate domicile of a married woman. By the decision of Mackinnons Tr.v. Inland Revenue (1920) S c (HL) 171 it was laid down that " however clear the facts may be that the wife was not bound to adhere, this cannot of itself suffice to prevent the wife's domicile being that of her husband." See also Mangrulkar v. Mangrulkar (1939) S C 239, in which case the court expressly declined to exercise jurisdiction " ex necessitate " in proceedings for divorce by a deserted wife. For the details reference is made to p.247..

(3) U.S.A. Law.

American courts recognise the right of a wife to acquire an independent domicile subject to some qualifications;

see p.251.

Yet a wife at fault is usually unable to acquire a separate domicile (Williamson v. Osenton (1914) Rep. 232 US 619. Feuerstein v. Feuerstein, 183 Atl. 705; Del. Sup. Court 1936), and the courts equally refuse to allow a deserting husband to retain the power to change his wife's domicile. (Morris v. Morris 160 Misc. 59, 289 NY Supp. 636; Dom. Rel. Court 1936).

(4) Under French Law (art. 108) a woman separated from bed and board ceases to have that of her husband as her legal domicile.

Yet there is not conferred thereby on the wife an independent domicile for the purposes of founding jurisdiction in divorce proceedings.

The Tribunal of the Seine, May 14, 1926 (Affaire Crana) held that an American married woman may establish her own de facto domicile in France provided the requirements under American law are complied with.

(5) Austrian Law. A separate domicile of a married woman is not recognised under Austrian law. Since the test of jurisdiction in divorce proceedings is the last common domicile of the spouses according to para. 76 of the jurisdiction Rules a deserted wife may sue for divorce in the court of that place. See p. 264.

(6) Under German Law a married wife may acquire an independent domicile according to para. 10 German Civil Code :

(a) if the husband establishes a domicile at a place in a foreign country to which the wife is not bound to, and does not, follow him; or

(b) if the husband has no domicile .

No jurisdiction "ex necessitate" for a divorce petition by a deserted wife of foreign nationality exists under German law; for the details reference is made to p.269. Finally art. 25 (2) Swiss Civil Code states that a wife may have a separate domicile:

(a) If the domicile of her husband is unknown; or

(b) If she is entitled to live apart from him.

Thus, since according to art. 144 of the Swiss Civil Code the test for jurisdiction is a domicile of the petitioner, a deserted wife may sue for divorce at her domicile. For the details reference is made to p.272..

As indicated by the preceding paragraph, the law of domicile is a matter of great importance in the law of marriage. The position of a wife in a recognized marriage is a recognized one throughout Christendom. The laws of all Christian nations surround that status with a variety of legal incidents during the lives of the parties, and invest definite rights upon their dissolution.

Although it is true that a polygamous marriage can never be the subject of matrimonial jurisdiction under English law, it may be held valid for some other purposes as, for instance, legitimacy of children.

There are a few elements involved in this legal relationship of a contractual (consensual) nature. On the other hand, there are some elements quite different from what belonged to ordinary contracts, as will be discussed later.

Some confusion has arisen from confounding the contract we carry with the marriage relation itself. From the view of marriage as a contract has evolved the theory of the so-called "English Marriage." For the details reference is made to p. 91 and 230.

Chapter VI.

Husband and Wife.

Marriage.

English Law. Since the existence of a valid marriage is the presupposition of a proceeding for divorce, there are a few statements to be made with regard to how this legal relationship is to be treated, at least in outline.

(a) Only a "Christian" marriage i.e. a monogamous marriage can be the basis of divorce proceedings under English law. This rule is laid down in the case of *Hyde v. Hyde* LR 1 P & X 130 where marriage is defined as a "union of one man with one wife for life."

"Marriage can well be said to be something more than a contract either religious or civil- to be an institution. It creates mutual rights and obligations as all contracts do but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom. The laws of all Christian nations surround that status with a variety of legal incidents during the lives of the parties, and invest definite rights upon their offspring."

Although it is true that a polygamous marriage can never be the subject of matrimonial jurisdiction under English law, it may be held valid for some other purposes as, for instance, legitimacy of children.

(b) There are a few elements involved in this legal relationship of a contractual (consensual) nature. On the other hand, there are some elements quite different from what belongs to ordinary contracts, as will be discussed later.

Some confusion has arisen from confounding the contract to marry with the marriage relation itself. From the view of marriage as a contract has evolved the theory

of the so-called "English Marriage." ~~XX~~
For the details reference is made to p. 91 and 235.

That doctrine that jurisdiction in divorce might be founded on a domicile called " the domicile of marriage " of a less permanent character than the domicile of succession was followed by some decisions: Yelverton v. Yelverton (1859) Brodie v. Brodie (1861) 2 Sw & Tr 259; Niboyet v. Niboyet (1878) 4 PD 1.

No clear definition of the " matrimonial domicile" was given by those decisions as, for instance, " the place where it is the duty of the wife to rejoin her husband" or " the place where the home or seat of the marriage is for the time being."

This theory was finally dismissed in Le Mesurier v. Le Mesurier (1895) AC 517 where the modern rule was laid down that the sole test of jurisdiction in divorce is the domicile of the husband.

Under English law the use of the term " matrimonial domicile" is now confined to marital interests in property and to succession as regards movables. Thus the question whether a will as to movables is revoked by marriage is governed by the law of the matrimonial domicile i.e. by the law of the country where the testator was domiciled at the date of the marriage.

Under American law the term " matrimonial domicile" is applied to the determination of the validity of a decree of divorce pronounced by a court of the residence of one party without personal service of process on the other party. See p..251..

Scottish Law. Theory of the Special Matrimonial Domicil.

This doctrine was first formulated in Jack v. Jack (1862) 24 D 467; it was held in this case that the court of the place of residence of the married pair for the time had jurisdiction in divorce, that a special matrimonial domicile or something less than permanent domicile is sufficient to found jurisdiction. Lord Justice Clerk pointed out there - " The true urgency, I apprehend, in every such case, is - where is the home or seat of the marriage for the time - where are the spouses actually if they be together, or if from any cause they are separate, what is the place in which they are under obligation to come together and renew, or commence, their cohabitation as man and wife ? "

The judicial definitions of " matrimonial domicile " were also in the later decisions based on this theory wanting in precision. In Wilson v. Wilson 10 Macph. 573 the Court took the view that the effect of the judgment Pitt v. Pitt 1 Macph. 106 was that a matrimonial domicile must be held to be unknown to the law.

In Low v. Low 19 R 115 (1891) Lord Trayner expressed a clear opinion that no domicile but an absolute domicile could confer jurisdiction in actions of divorce.

In Dombrowitzki v. Dombrowitzki 22 R 906 (1895) it was held that Jack v. Jack 24 D 467 (1862) was still a binding authority. This theory was finally dismissed by

Le Mesurier v. Le Mesurier (1895) AC 517 CF.

Hall v. Hall (1895) 32 SLR 468.

English Law. Status Theory.

The marriage contract differs in many a respect from the

5/ 2

ordinary contracts.

At common law, marriage has only a few elements of contract: E.g. no other contract merged the legal existence of the parties into one, as ^{does} the fiction of the unity of husband and wife at common law. It cannot be rescinded or its fundamental terms changed by agreement. The rights and obligations arising from this relation are not assignable nor transferable. It is not a mere contract; it is a status of great public interest; it is founded upon consent and contract of the parties... but once created, every country declares the rights, duties and obligations. See p. 91... Sottomayer v. De Barros, 1879, PD 94 at p. 101 per President; "Marriage is a status arising out of contract to which each country is entitled to attach its own conditions, both to its creation and duration." That the creation of this status is not ruled by the *lex loci contractus* only as it was held by the contractual theory of marriage and that a distinction between the forms of entering into the contract of marriage and the essentials (substance) of the contract must be made, was emphasised in *Brook v. Brook* & H.L. Cases 193, 208. (1861) by Lord Campbell who pointed out: "If contrary to the law of the country of domicile and declared void by that law, the marriage is to be regarded as void though not contrary to the law of the country in which it was celebrated."

Nature and Classes of Marital Offences,
and Remedies other than Divorce.

Marriage is first of all a spiritual and ethical union; not all of the ethical obligations springing from this marital relation however are protected by law.

Marriage, being also an important social institution, is given special protection by the state and its laws, in some respects even by its criminal laws.

The marital rights and duties can be classified according to the main divisions into such as spring

- (1) from the personal relation of the spouses; and
- (2) from their proprietary relation.

As it is difficult with regard to some marital matters to draw a strict line between these two aspects, there is to be added -

- (3) a third group, comprising marital rights and duties of mixed character, such as maintenance, custody and education of children and the like matters.

The laws of the different countries provide a series of measures intended to safeguard those marital obligations; we shall briefly state some of the remedies short of divorce which the different laws adopted in order to make common life bearable for the spouses and to avoid the last resort to the dissolution of marriage. In default of any possibility of exhausting all the remedies other than divorce which may be granted against an offending spouse under the different systems of law concerned, a brief outline only can be given in order to show the main features of this subject.

Remedies under the Penal Laws.

English Law. Every country protects the marriage status by charging with the crime of bigamy a spouse who contracts a second marriage during the subsistence of the former.

Bigamy is under Section 57 of Offences against Person Act, 1861, a felony; who, being married, marries another person during the life of the former husband or wife, is guilty of that felony. The real test is not the carnal intercourse, but the going through of the marriage ceremony, except where the second marriage is contracted outside England or Ireland by anyone who is not a British subject. Defences to bigamy are :

(a) That the second marriage has been contracted elsewhere than in England and Ireland by any other than a British subject.

(b) Presumption of the death of the former husband or wife, having been continuously absent for more than seven years from the accused during which period he or she has not been known to her or him to be living. In order to afford a defence against a charge of bigamy, the divorce must be valid by the law of the domicil of the spouses at the institution of the divorce proceedings.

Any here

from /

Should be on next page

For the presumption of death, underlying the new ground of dissolution of marriage, see p.99. In R.v.Tolson(1889) 23 QBD. 168, it has been held that a bona fide belief on reasonable grounds that a spouse is dead constitutes a defence to a bigamy charge, but in R.v. Wheat and Stock (1921) 15 Cr.App. B. 134, it was decided that a bona fide belief

in a supposed divorce is not a defence to such a charge. The discrepancy in the decisions can only be explained in that way that in one case the mistake is one of fact, in the other it is one of law, since divorce is at least a mixed question of law and fact.

(c) The dissolution of the first marriage by a decree of divorce or nullity, and

The divorce, in order to be a good defence, must be pronounced by a court of the domicile of the husband at the date of marriage or must be valid by the law of that domicile. See p.45. In Lolley's bigamy case (1812)

Rn & Ry. 237 the court refused to recognise a Scottish divorce concerning an " English marriage " and the rules laid down in this case prevailed for some time in English law on divorce. For the details reference is made to P....

II. Non- support by a spouse may be punishable under the following conditions (Vagrancy Act, 5 Geo. IV c. 83)

(a) A person whose wilful neglect to work causes him or her or any of his or her family, to become chargeable to the parish ;

(b) a person running away and leaving his wife or child chargeable to the parish.

III. The common law under which a spouse could not steal the other's goods, has been modified by the Married

Women's Property Act. 1882 ss.12 and 16, Married Women's Property Act, 1884, c.14 and the Larceny Act, 1916,

(6 & 7 Geo. V c. 50) so that a spouse may now become chargeable with the crime of larceny for stealing the

the other's property, provided they do not live together. Under the Continental systems of law, provisions in the Penal Courts exist punishing infringements of marital infidelity. 2

French Law. Whereas the inequality of the sexes as regards adultery as a ground of divorce has been removed by the law of 1884, inequality still obtains with regard to the crime of adultery, Art. 336-9 of the Penal Code. The guilty wife and her accomplice may be sentenced to imprisonment while the husband is liable for of misdemeanour only if he takes his concubine into the conjugal home; his accomplice is not liable to any charge for adultery, and he is liable only to a fine. In such cases there lies also under the French law an action for special damages.

Austrian Law. Under Austrian law adultery and other infringements of marital infidelity short of adultery are punishable against the adulterer and his or her accomplice paras 502, 525, STG.

The injured party is left to prosecute his or her case before the criminal court as private prosecutor vested with the power of a public prosecutor subject to some qualifications; the same rule applies to petty assaults and libels.

Since the accused is often merely bound over for a certain period, such criminal prosecution is a means of restraining the guilty spouse from further unlawful acts.

Non-support may become chargeable under certain conditions according to the French law of February 7.1924 and the

Austrian law of February 4. 1925 Austrian Federal Law 66 Gaz. 69 .

The Common Law Fiction of the Unity of Husband and Wife.

Before entering into the discussion of the marital duties and obligations and ^{of} the remedies against their infringement, reference must be made to the legal fiction of unity of husband and wife under English law; it was this fiction that influenced marital relations greatly; the theory of unity of husband and wife is still operative in many a respect.

By the theory of the common law, husband and wife were "one in law". (Bracton lib. 5 fol.416);Coke in his work upon Littleton sect. 291 cites Bracton and declares:

" The husband and wife are but one person in law" and Blackstone (1 Bl. Com.442) states that by marriage husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage or, at least, is incorporated and consolidated into that of the husband." Thus the personality of a married woman merged on her marriage in that of her husband, for most purposes:

- (a) a married woman could at common law by reason of this theory not sue at all; she could only sue in the ecclesiastical courts in matrimonial matters.
- (b) She was therefore unable to sue for damages, for loss of her husband's society, while he could in the courts of common law, sue the adulterer ^{for} on criminal conversation. Even when this matter was transferred to the jurisdiction of the divorce court created by the Matrimonial Causes Act of 1857 there was no alteration of the legal position

of a married woman in this respect; this inability of the wife is still operative.

(c) Husband and wife cannot sue each other in tort. The wife may now sue her husband for the protection and security of her own separate property. Sec. 12 of the Married Woman's Property Act, (1882).

Criminal proceedings may, however, be instituted by the spouses against each other for the protection of their respective persons but they cannot claim damages from each other as above stated, in such personal torts.

(2) a) Although they are not any more one person in law, there are still consequences of that fiction operative apart from those stated above. For instance, in the case of the wife's domicil.

(b) The wife cannot sue the husband for support without instituting a petition for separation or divorce, For further discussion reference is made to page..85.

but she may act as agent of necessity and so pledge her husband's credit, so that a third person contracting with her as regards necessities, may sue the husband.

(c) They still cannot bring an action against each other for tort, such as for negligence, libel, slander, assault.

See ^{Queen v.} R.Lord ⁸Y. Mayor of London (1866) 16 QBD 772.

(3). Duties and obligations springing from the personal relationship of the spouses and the civil remedies against their violation.

From the personal relationship flow the reciprocal obligations

- (a) as to conjugal fidelity
- (b) consortium and
- (c) conjugal sexual intercourse.

As to (a) conjugal fidelity; at common law the husband had, for the protection of his right in the society of his wife, the remedy

(1) of the action for criminal conversation against an adulterer and

(2) an action for alienating his wife or causing her to leave him (enticing her away and harbouring her) against a third person causing the loss of the society.

The first- named action which was an action to be brought in the common law courts was abolished by the M.C.Act of 1857 by which it was enacted that an action claiming damages for the same tort is to be brought in the Divorce Court. This right is denied to the wife since she had no right to sue before a court of common law with respect to the fiction of unity between husband and wife that caused her disability to sue at common law; that disability still obtains.

As regards the action of enticing away, the position has now changed, for, since the decision of *Lynch v. Knight* (1869) HLC 589, LTR 5 (NS) 291, the wife is now deemed to be entitled to sue against any party who interferes with her right of society and affections of her husband. It may be added that since 1882 the inability of a wife to sue at law without the joinder of her husband as a complaintiff has been removed. This requirement, too, prevented the commencement of any such action by

the wife, at common law.

Consortium. Husband and wife are mutually entitled to each other's society. This right could be enforced by a decree for restoration of conjugal rights and by imprisonment in case of disobedience; but, since the Matrimonial Causes Act of 1884 (47 & 48 Victoria. c. 68) this right is not enforceable any longer by attachment; failing to obey such decree of restoration of conjugal rights the husband is liable, at the discretion of the Court, to make a proper provision for the deserted spouse.

Continental systems of Law.

Under Austrian and French Law an order of restoration of conjugal rights may be enforced even by measures of physical coercion. In Austria this conjugal right is enforceable both against the husband and against the wife: Collection XI, 4323, XIV 5445, Collection 7736, 11669.

Under French law executory force may be used only against the husband: Lyon May 14, 1920, D. 1920, 2. 128; but not against the wife: Tr. Dijon, Jan. 29, 1912.

Under French Law an action for special damages lies also against a deserting spouse; the damages adjudged upon are often of moratory character in order to compel the spouse to discharge his duty. Clermont-Ferrand, Aug. 9, 1900, Gaz. Pal. 1900, 2 - 620. 21

Under German law an order of restoration of conjugal rights is not enforceable, according to para. 888 Code of Civil Procedure.

Right of the spouse to sexual intercourse.

The right to sexual intercourse is at common law not enforceable. See *Forster v. Forster* (1790) I Hagg.Cons. 144, 154 and *Orme v.Orme* (1824), Hagg.Add.382.

Its distinctive character in the marriage relation was emphasised by Lord Sands in *Goold v. Goold* (1927)

SC 177 :

" Sexual intercourse, with the intimacy that it denotes, is the distinctive element in marriage. Bonds of the closest affection, domestic association of the most constant character, may exist between two persons of the opposite sex- mother and son, brother and sister. It is sexual intimacy which marks off, and distinguishes all such attachments from the marital relationship."

In *Jackson v. Jackson* (1924) P. 19 Lord Merrivale held that the mere refusal and deliberate abstinence from sexual intercourse, while both parties continued to abide under one roof, was not desertion. But cf. *Synge v. Synge* (1900) P. 180 in which case, however, the spouses lived apart.

It is noteworthy that wilful refusal to consummate the marriage has been made a ground of annulment of marriage under Section 7 (1) (a) of the MCA. (1937).

Scottish Law : There are many authorities in Scottish law for the proposition that a spouse has a right of sexual intercourse and that its refusal constitutes desertion, even without any overt act of desertion; but existing rules of evidence preclude the protection of this right. In the decision of *Creditors of Watson of Damhead v. Cruikshank* (1681) M 330 it was pointed out

" the Lords found that co- habitation was a sufficient

presumptive probation for the wife's converse (sexual intercourse) with the husband as wife, unless the wife proves that though she remained in the house, she withdrew from the husband's conversation and lay in several room from him. "

In the decision referred to on p.79. Lord Sand pointed out:

" The view was suggested that where a spouse refuses intercourse the other spouse may withdraw from society, and this spouse would be entitled to divorce for desertion, but only four years after such withdrawal. There is no complete interruption of all relationship or of personal or domiciliary contact, and that sexual relations are the distinctive element of matrimony, I have formed the opinion that persistent refusal of sexual intercourse for four years without any better reason than disinclination or distaste, and without acquiescence therein on the part of the other spouse, may be a relevant ground for divorce for desertion."

The Court held the pleas of acquiescence on the part of the pursuer established and dismissed the action for divorce.

In a recent action of divorce ~~on~~ desertion founded upon refusal of marital intercourse, Robertson v. Robertson (O.H.) (1939) Sc LT 432 it was held that it would involve a proof not only of what happened in the marriage chamber but also of what happened in the marriage bed, an investigation into which the court could not enter; since proof of the averments requisite for relevancy was impossible without admitting incompetent evidence, the action has been dismissed.

Continental Law: Under French law an action in tort or in quasi- tort according to art. 1382 CC lies for damages for refusal of sexual intercourse.

Montpellier, Nov. 27, 1897, La Loi June 11, 1898.

Property Relations between husband and wife and civil
Remedies against infringement of the relative duties.

As above stated, by the legal theory of conjugal life, the wife is held to be one person with her husband.

By reason of this theory they could neither contract with nor make any gifts to each other.

The only exception to this rule was separation agreements, the validity of which was, after some decisions to the contrary, eventually recognised; such agreements could be enforced.

See Wilson v. Wilson (1841) 1 HLC. 538. (1854) 5, HLC 14, Bateman v. The Countess of Russ 1 Dow 235.

Since it was impossible at common law to convey land by a husband to his wife for reason of that fiction of unity between husband and wife, he could only convey his land to a friend and his heirs for the "use of his wife and her heirs"; in that way the equitable estate was created; the wife's interests in that estate were only enforceable in equity.

Equitable Separate Property of a married woman :

(1). Land and other property which was conveyed to trustees "to the separate use" of the wife could be dealt with by her in equity as if she were unmarried. (feme sole).

See Cooper v. MacDonald 7 ChD. 288 These rights were, however, usually restricted by the clause of the so-called "restraint of anticipation" by which she was prevented from anticipating or alienating such separate property. See R. v. Bower, 27 Ch. 411.

(2). The wife's equity to a settlement.

The courts of equity following the equitable maxim "he who seeks equity must do equity" modified the husband's common law right to his wife's equitable choses in action and ordered him to make provision for his wife by a settlement of the whole or part of such property.

Murray v. Elibank (10 Ves. 84); 1 W and T.LC 493,

Elibank v. Montelieu 5 Ves. 737, 1 W and T 541.

After the Judicature Act. (1873) the wife's equity applied to her legal as well as to her equitable interests.

See Boxall v. Boxall 27 Ch. 220.

Since the Married woman's Property Act. (1882) by which the legal position of the wife as to her property was entirely altered, there was no necessity any longer for enforcing this equitable right of the wife.

Furthermore, since the Law Reform (Married Women and Tortfeasors) Act, 1935, 25 and 26 Geo.5 c.30, the legal position of a married woman as regards her property is the same as that of an unmarried woman in all respects; she now holds her property unaffected by any rights on the part of her husband.

Finally, by reason of the common law theory of unity of husband and wife, a gift of land to a husband and his wife and another party as joint tenants or tenants in common gave one half only of the land to the husband and wife between them, and the other half to the third party;

Re Jupp, (1888) 39, Ch.D. 148; according to sec.37 of the law of Property Act 1925 (15 Geo.5 c 20) in case of such a gift of land after the 1. of January 1926, to a husband and wife they are treated as two persons.

Continental Systems of Law.

Under English Law , as stated above, the matrimonial system now obtains of separate estates of the spouses who do not enter into a marriage settlement.

The same marital system exists under Austrian Law whereby the husband has the management of his wife's property until it is revoked by her.

In Germany the so- called Administrative System rules principally i.e. the management and enjoyment of the wife's property falls to the husband, but the wife is entitled to sue for termination of the administrative management on certain grounds, as, for instance, if the husband fails to render her or the children of the marriage reasonable support.

The statutory system may by agreement of the parties be replaced by some other system.

Under German Law the statutory presumption also exists as between husband and his creditors that all movable things not serving exclusively for the wife's personal use or ornament, which are in the possession of one of the spouses, belong to the husband.

In France the statutory marital system of community as regards movable property prevails; by this system the husband has the right of management, enjoyment and disposal. The wife, however, retains her ownership as regards immovable property, the management of which falls to the husband. Since the Statute of February 18th, 1938, the wife has the power to alienate her immovable property

provided that the interests in the property remain available to the community of goods. Further the wife may claim damages to be paid by her husband for fraudulent management and may also obtain a judicial order of separation of the estates against him, when her dowry is in danger, or when the husband's affairs are in such disorder that there is reason to fear that his property will not be sufficient to answer for the wife's rights or claims. Article 1530 - 1535 cc. Article 1443 cc.

Mention may finally be made in this connection of the legal institution of a judicial adviser; a spouse may make an application for appointing a judicial adviser when the other spouse by his squandering attitude endangers the financial situation of the family so that the family could become destitute. Article 513 cc. C.C.

Apart from that marital property system of community of goods, there exists under French Law also the so-called dotal (dowry) system under which the dowry is inalienable during marriage and after dissolution of the marriage, the ownership of the wife revives. (Article 1540, 1561 cc). C.C.

Finally, mention may be made of a third marital property system under which either spouse retains the ownership, management, and enjoyment of its movable property. reference

Under Swiss Law the effect of marriage upon the property of the spouses is governed by the following principles, in so far as no other provision has been made :

(1). In the absence of a marriage contract the so-called administrative system of property prevails; by this the wife's property, except her separate estate, falls into

the management of the husband; the wife remains the owner thereof; the courts may, in case where the husband fails to provide maintenance for her and a child of the marriage, make an order for separation of the estates, (such order may be made at the instance of either spouse on certain grounds) Article 183 Swiss Civil Court.) de/

(2). The system of community of property, under which the property of husband and wife, with the exception of their separate estates, belongs to both spouses in common ; the husband has the management of the common property, whose profits are shared by both.

(3). The system of separate estates under which either spouse retains the ownership, management and enjoyment of his or her property.

The duty of support and the relative civil remedies other than divorce against infringement of this duty.

English Law. At common law the husband is liable to maintain his wife, but as long as they are living together, the law provides no means of enforcing this duty. The magistrate could only make him liable to the parish for the sum allowable as pauper relief by the Poor Laws Act when his wife and children have become chargeable to the parish. The Court of Equity created at a later date the wife's equity to a settlement, see Page.81.. to be made out of her property; but equity could not alter the position of married women who had no property.

The wife, if living apart from her husband by reason of his misconduct, may pledge his credit for necessities as his agent of necessity; this is a legal authority that

cannot be revoked by him by a general or particular prohibition as long as she has a just cause for living apart; the third person may in such a case sue the husband for the necessaries furnished to the wife. Only as an incident for divorce or judicial separation a wife may sue her husband for alimony and maintenance respectively.

In *Hymans v. Hymans* (1929) 45 TLR. 444, it was held that the parties to a marriage cannot validly make an agreement as to maintenance either (1) not to invoke the jurisdiction of the Court, or (2) to control the powers of the Court when its jurisdiction is invoked, and therefore such a deed is not binding and may be altered by the Court after decree absolute in her favour. The power of the Court to modify maintenance orders which are regulated by Ss. 190 and 196 of the Judicature Act 1925 are now widened by Section 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938). The wife having separate property may be made liable by the guardians of the parish for the sum of allowance paid to her husband and children which have become chargeable to the parish; this liability is imposed on the wife only if her husband is disabled from supporting himself or the children. Married Women's Property Act. (1882) .Section 20.

U.S.A. Law. The common law liability of the husband for necessities furnished to the wife is laid down in a great number of statutes.

When the husband neglects his duty of support, some statutes give now relief without divorce and authorise the wife herself to take proceedings against her husband in order to enforce this duty.

Finally some of the jurisdictions have adopted the Uniform Desertion and Non-Support Act which was approved by the National Conference of Commissioners of Uniform States Laws in 1910. By this Act non-support is made an indictable offence, but the court may release the husband on probation upon his promise or undertaking to furnish proper support for his wife.

Continental Systems of Law.

Under German Law, (1360), German Civil Code and Austrian Law (91 Austrian Civil Code) the husband is liable to maintain his wife according to his station in life, his property and his ability to earn; the wife is equally liable to support her husband if he is unable to maintain himself.

According to Article 214 French Civil Code, the husband is liable to maintain his wife according to his means and position. The same liability obtains under Swiss Law. By Article 171 Swiss Civil Code the judge may, where the husband neglects his duty of supporting his wife and children, direct the debtors of the spouses, regardless of the subsisting matrimonial property system, to make all or part of their payments to the wife alone.

See above as regards separation of the estates by judicial order in case of the husband's failure to support his wife and children. p.85

As under English law, the husband is, under the Continental laws concerned, the head of the family, who has the right to decide in all matters concerning the common matrimonial life, and particularly the place of domicil. Paragraph 1353 of the German Civil Code, Art. 214 of the French Civil Code and Art. 160 of the Swiss Civil Code. For further discussion of the married woman's domicil, see p.63... The wife may sue and be sued and her full capacity is recognised by those laws, in France since the law of February 18, 1938, see the amended article.215.

The wife may follow any profession, trade or business, and in case where the husband dissents, a judicial order may be made, Art. 168 of the Swiss Civil Code.

The wife has the duty and right of managing the household; she may therefore, by reason of her general and implied authority, pledge her husband's credit with regard to necessaries for the common life. para.1357 German Civil Code and Art. 163- 164 Swiss Civil Code.

The husband may restrict or exclude this right of the wife; if the exclusion or restriction is shown to be a misuse of the right of the husband, it may be cancelled on application of the wife.

Chapter VII.

1. Divorce. Law in British Commonwealth.

In general.

There have been discussed above some of the remedies which are available by the laws of the various countries against violation of marital obligations. Another remedy granted in case of marital offences of a graver character is the judicial separation from bed and board; this remedy is granted in France and Switzerland on the same grounds as divorce; in England, it may equally be obtained (1) on the same grounds as divorce and apart from those also (2) for disobeying a judicial order of restitution of conjugal rights and (3) on the ground of unnatural offences.

The institution of judicial separation is unknown to German law.

The most important of all remedies against marital offences is that of divorce.

English Courts have maintained three theories on the nature of divorce:

(1) The penal (2) the contractual and (3) the status theory.

(1). The penal theory:

The canon law divorce *a mensa et thoro*, which, as above stated, p.3., was the main basis of the legislative divorce *a vinculo matrimonii* before the passing of the Act, 1857, was granted by the ecclesiastical courts on penal principles. Adultery, the sole ground of legislative divorce, has been treated as a crime, punishable by the Spiritual Courts and it was held by this theory that

Chapter VII.

1. Divorce. Law in British Commonwealth.

In general.

There have been discussed above some of the remedies which are available by the laws of the various countries against violation of marital obligations. Another remedy granted in case of marital offences of a graver character is the judicial separation from bed and board; this remedy is granted in France and Switzerland on the same grounds as divorce; in England, it may equally be obtained (1) on the same grounds as divorce and apart from those also (2) for disobeying a judicial order of restitution of conjugal rights and (3) on the ground of unnatural offences.

The institution of judicial separation is unknown to German law.

The most important of all remedies against marital offences is that of divorce.

English Courts have maintained three theories on the nature of divorce:

(1) The penal (2) the contractual and (3) the status theory.

(1). The penal theory:

The canon law divorce a mensa et thoro, which, as above stated, p. 3... , was the main basis of the legislative divorce a vinculo matrimonii before the passing of the Act, 1857, was granted by the ecclesiastical courts on penal principles. Adultery, the sole ground of legislative divorce, has been treated as a crime, punishable by the Spiritual Courts and it was held by this theory that

adultery did not dissolve the marriage ex pacto, but was a crime upon which the party injured might desert the offender and ask for divorce. 6/

By the Matrimonial Causes Act., 1857 the power of granting divorce a vinculo matrimonii was assigned to the Matrimonial Causes Court, created by that Act, and those penal principles continued to influence the proceedings of divorce. Expressions, such as " Crime of Adultery" Criminal Offence " found in the decisions flow from those principles. This penal theory had thus for some time a bearing on divorce proceedings until it was rejected by the Courts on the reasoning that proceedings of divorce are not criminal but civil.

10/5/ Brandford v. Brandford (1378) 4 PD 72.73, following the decision of the House of Lords in Mordaunt v. Bramford

e/ Moncriffe LR 2 H L Sc 374.

Under this theory a foreign decree of divorce would not be entitled to recognition since it was of a penal character.

For jurisdiction in divorce on the penal basis (locus delicti commissi) reference is made to the heading " Scottish Law jurisdiction " page. 246.

(2) Contractual theory of divorce.

By this theory the grounds for divorce are considered as breaches of the marriage contract; hence principles relating to private contracts, have, at least in part, been followed in the administration of divorce law.

The contractual point of view is stressed in that well known decision on "recrimination" of Beeby v. Beeby 1 Hag. Eccl. 790, in which the following was pointed out :

" The doctrine that this (plea of recrimination) if proved is a valid plea in bar has its foundation in reason and propriety; it would be hard if a man could complain of a breach of a contract which he has violated."

From this theory it also followed that the dissolubility of the marriage depended on the special terms of the marriage contract which led to the conception of the " English marriage ", that as celebrated in England was at that time (before 1857) indissoluble by a foreign Court (and was held so in a few decisions after that date) see page.235.

On the basis of this theory has also developed the doctrine of " the matrimonial domicile " see p..68..

(3) Status theory.

The marriage relation is established by contract, but being once established the power of the parties as to its content or duration is at an end; according to the status theory of marriage, outlined above, divorce is the act by which a state through a public authority dissolves or puts an end to the marriage status at the instance of a spouse on grounds which, subsequent to the marriage, frustrate its fundamental purposes. The state is highly interested in marriage relations since marriage is that unit on which every community is based. It is the modern trend of legislation of the diverse states to allow divorce not exclusively on the misconduct of the defendant, as it was the case up to now, but to grant it irrespective

The contractual point of view is stressed in that well known decision on "recrimination" of Beeby v. Beeby 1 Hag. Eccl. 790, in which the following was pointed out :

" The doctrine that this (plea of recrimination) if proved is a valid plea in bar has its foundation in reason and propriety; it would be hard if a man could complain of a breach of a contract which he has violated."

From this theory it also followed that the dissolubility of the marriage depended on the special terms of the marriage contract which led to the conception of the " English marriage ", that as celebrated in England was at that time (before 1857) indissoluble by a foreign Court (and was held so in a few decisions after that date) see page.235.

On the basis of this theory has also developed the doctrine of " the matrimonial domicil " see p..68..

(3) Status theory.

The marriage relation is established by contract, but being once established the power of the parties as to its content or duration is at an end; according to the status theory of marriage, outlined above, divorce is the act by which a state through a public authority dissolves or puts an end to the marriage status at the instance of a spouse on grounds which, subsequent to the marriage, frustrate its fundamental purposes. The state is highly interested in marriage relations since marriage is that unit on which every community is based. It is the modern trend of legislation of the diverse states to allow divorce not exclusively on the misconduct of the defendant, as it was the case up to now, but to grant it irrespective

of any guilt on the part of the other spouse in cases where the marital relationship has become practically impossible of continuance (by reason of insanity), contagious diseases, long absence of the other spouse, even if not caused by his own fault).

The well recognised purposes of marriage do not rest upon agreement of the parties to the marriage, but upon the general law, common or statutory which defines those marital rights, duties and obligations; different communities, of course, have different views and laws respecting marital obligations and different estimates of the causes which should justify divorce.

Those rights and duties relate in the main as outlined above, page 71. to consortium, mutual, conjugal fidelity and assistance, engendering and bringing up of offspring, to marital proprietary relations and to support (maintenance).

Since these marital duties are by the status theory not based on the marriage contract but on the law, divorce is by this theory regarded neither as an action in tort nor as an action for breach of a contract but as an action sui generis.

Divorce involves a change of status whereby the spouses regain the character of single (unmarried) persons and the right to remarry. A judicial separation, on the contrary, leaves the status of the parties unchanged as Gorell Barnes J. put it in *Armitage v. Armitage*, (1898)

(P 178 at p. 196:

" According to those principles and rules cruelty and adultery were grounds for a sentence of divorce a mensa et thoro which did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties; the sentence commonly separated the parties until they should be reconciled to each other. The relation of marriage still subsisted, and the wife remained a feme covert."

Finally, divorce a vinculo matrimonii differs from a decree of nullity of marriage in that by the latter the marriage is declared to be void ab initio on grounds, generally, precedent to the marriage; yet among the grounds for a petition of nullity of marriage there is by the MCA, 1937, also provided a ground subsequent to the marriage, namely, that of " wilful refusal of the respondent to consummate the marriage". For bases of jurisdiction in petitions of nullity of marriage, reference is made to p.242:

A further difference consequential to that just stated is this that the legal status of the issue born of a marriage remains unaffected by a decree of divorce while in case of a decree of nullity of marriage the issue is deemed illegitimate; there are, however, some exceptions to the latter rule:

- (a) Under Scottish law and under some continental laws children of a "putative" marriage are held legitimate,
- (b) Under English law according to sec.7 (2) of MCA 1937 children of a marriage avoided on the grounds of insanity or mental deficiency or of venereal disease (sect.7 , (1), (b), (c) of MCA 1937 are deemed legitimate notwithstanding that the marriage is so avoided.

English law on divorce. is consolidated in Part VIII of the Judicature (Consolidation) Act 1925 as amended by MCA 1937.

Waiting period of three years for divorce petition.

By s.1 of the Matrimonial Causes Act of 1937 no petition (12841 C.57) for divorce is admissible unless three years have passed since the date of the marriage, save exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent could be proved. On considering the application for such leave to present a petition before the ~~exp~~iration of three years from the date of the marriage, the judge must take into account the interests of any children of the marriage and must enquire into the question whether a reconciliation between the parties is probable. Where the judge, at the hearing of the petition is satisfied that the petitioner obtained leave to present the petition by misrepresentation or by concealment of the nature of the case, he may dismiss the petition or may, if he pronounces a decree nisi, ordain that no application to make the decree absolute shall be made before the expiration of the three years' period mentioned above.

Grounds of Divorce

Under English law divorce is mainly based upon the guilt of the other spouse.

Grounds of divorce based on guilt are :

(a) Adultery.

Adultery is sexual intercourse between a husband or wife and one of the opposite sex while the marriage subsists.

Prior to 1923 a wife could obtain a divorce on her husband's adultery only if it was incestuous, or bigamous, or by way of rape, or if she established an additional ground of either cruelty or ~~desertion~~ for at least two years; by the Matrimonial Causes Act of 1923 (13 & 14 Geo. V c 19) the rights of husband and wife were equalised in this respect. For the specific evidence rules with regard to adultery see p 202.

(b) Desertion for at least three years.

The MCA of 1937 contains no definition of ~~desertion~~.

In a passage of the decision of Jackson v. Jackson (1924) P 19, 23 desertion is defined by Lord Merrivale to be (1) where there is abandonment by one of the spouses of the other, and (2) where one of the spouses causes the other to live separate and apart. A similar definition is given by Sir Francis Jeune P. in Frowd v. Frowd (1904) P 177, 179 : " Desertion means the cessation of cohabitation brought about by the fault or act of one of the parties. "

Under the MCA, 1937, the petitioner has to establish a state of things amounting originally to desertion and has to prove that that state of things has continued throughout the three years immediately preceding the presentation of the petition. The triennial period of sec. 2 of the MCA, 1937, differs in this respect from the statutory periods under the MCA, 1857, and the Judicature (Consolidation) Act, 1925, respectively in that the period cannot be completed until the presentation of the petition.

In cases where a conversion of a decree of judicial separation or of an order of separation into a divorce is sought, according to sec. 6 subsec. 3 a period of desertion immediately preceding the institution of the proceedings just mentioned shall, if the parties have not resumed cohabitation and such decree or order has been continuously in force since the granting thereof, be deemed immediately preceding the presentation of the petition.

Where the requirements set forth in sec. 6 subsec. 3 l.c. are not complied with such decree of judicial separation or such order of separation terminates desertion; the same applies to a maintenance order by a Court of Summary Jurisdiction containing a non-cohabitation clause.

(Harriman v. Harriman (1909) P 123).

A separation agreement terminates also desertion until such agreement is repudiated by both spouses.

Ratcliffe v. Ratcliffe (1938) W.N. 203.

For insanity as a bar to divorce on desertion, reference may be made to this heading on p. 109.

In Jackson v. Jackson cited above Lord Merrivale P. held that the mere refusal and deliberate abstinence from sexual intercourse, while both parties continued to abide under one roof, was not desertion. But cf. Synge v. Synge (1900) P 180 and Smith v. Smith (1939) P 49, where, however, the spouses lived apart.

(c) Cruelty.

The new Act of 1937 contains no definition of

"legal" cruelty. The definition of this term is to be found in the decision of Russell v. Russell (1897) AC 395; According to this, legal cruelty is "conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or such as to give rise to reasonable apprehension of such danger."

Where these essentials can be established the courts grant divorce as the following decisions will clarify : In a recent case Horton v. Horton (1940)P.187.

it has been pointed out that conduct rendering ~~common-~~ life unbearable ~~sible~~ and causing injury to health is not ~~on~~ itself sufficient; there must be wilful and unjustifiable acts conducing to this result. In this case, physical violence, injury to clothing and deliberate efforts to prevent sleep, has been held as constituting legal cruelty against the husband.

The decision of this question depends often upon the strength of the constitution of the person illtreated; thus the same acts may constitute legal cruelty in the one case, but may not be deemed to be so in another case where the court is not satisfied of actual or potential injury to health.

Acts of cruelty to children by a husband may amount to legal cruelty to the wife ; this is termed " constructive" cruelty.

A spouse who has infected another with a venereal disease has been found guilty of cruelty in Browning v. Browning (1911) P 161 and Foster v. Foster (1921) P 438.

Finally, in Thompson v. Thompson (1901) 85 LT 172 the mere fact of the husband's conviction of a crime that caused a breakdown in the health of his wife was deemed "legal" cruelty.

(d). Rape, sodomy and bestiality as grounds of divorce by the wife :

Of the two spouses the wife only may petition for divorce on the ground of her husband's rape, sodomy or bestiality. Grounds of dissolution of marriage by either spouse regardless of guilt are :

(a) Incurable unsoundness of mind .

The new provision s.2 (d) of the MCA, 1937, grants to a spouse the right to a dissolution of his (her) marriage, if he or she can satisfy the court that the other spouse is incurably of unsound mind and has been continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition; the definition of that care and treatment is given in s.3 (a) of the MCA 1937 by reference to the statutory provisions concerning insane persons, such as Lunacy and Mental Treatment Acts 1890 to 1930, the Army Act, Air Force Act, the Naval Disciplinary Act, the Naval Enlistment Act 1884 and Yarmouth Naval Hospital Act 1931 and lastly in s.3 (b) by reference to the Mental Treatment Act 1930, with regard to voluntary insane patients.

In Shipman v. Shipman (1938) P 147 it was held that the requirement of s. 3 (a) of the MCA. 1937, was not

satisfied merely by the fact that the reception order as to the respondent was in force during the whole statutory period, and it has been there pointed out that absence on trial for prolonged period was not the same thing as actual detention under an order which was being enforced.

(b) Presumption of death of a spouse.

Where a party to a marriage alleges that reasonable grounds exists for supposing that the other party to the marriage is dead, the former may petition for a decree of presumption of the death of the other party and for a decree of dissolution of that marriage. (s. 8 subs. 1 of MCA 1937) .

In subs. 1 of s. 8 no time limitations are made; the court may therefore, when the petitioner is able to prove that the other party to the marriage has disappeared having been in mortal danger, for instance, on board a lost vessel, the court may, if satisfied, make the decree asked for . Under s. 8 subs. 2 of the MCA, 1937, the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party to the marriage has been living within that time, is evidence, that he or she is dead until the contrary is proved.

This presumption de jure has already been recognised by s. 57 of the Offences against the Person Act, 1861, under which it constitutes a defence against bigamy, in a case,

where a party to a marriage, believing the other party to be dead under the circumstances described above, contracted a second marriage.

See R. v. Curgerwen (1865) LR 1 CCR; R
R.v. Faulkes (1903) 19 Times LR 250;
Phene's Trust (1869) L R 5 CH 139;
Parkison v. Parkison (1939) P 346.

The parties who contracted a second marriage by reason of that legal doctrine of presumption of death were placed at the disadvantage in some respects, as for instance : Since that presumption is rebuttable, the second marriage must be declared void, if it is established that the first husband is alive ; where, on the other hand, after a decree absolute under s..8 of the MCA, 1937, has been pronounced, a second marriage is contracted, such marriage remains valid, even if it is afterwards shown that the first husband was alive at the date of the celebration of that second marriage.

Bars to divorce.

(A). Absolute bars to divorce, based upon guilt, were connivance, condonation and collusion;

(a) Connivance means approving of or aiding the marital offence of the respondent spouse.

(b) Condonation is forgiveness of a matrimonial offence constituting a ground of divorce, by continuing common life, especially sexual intercourse with the respondent spouse.

(c) By collusion is meant a corrupt bargain by which the parties agree fraudulently to obtain a divorce by

- 1) pretending the commission of a marital offence or
- 2) suppression of material facts.

Discretionary Bars and the Doctrine of Recrimination.

(B). Discretionary bars by s. 178(3) of the Judicature (Consolidation) Act, 1925, as amended by sec. 4 of MGA , 1937, are as follows ,

a) adultery, unreasonable delay and cruelty are discretionary bars to all grounds of divorce. and

b) desertion without reasonable excuse or wilful separation are discretionary bars to grounds of adultery and cruelty

c) wilful neglect and conduct conducing are discretionary bars to grounds of adultery, and incurable unsoundness of mind and desertion.

Before discussing these bars in detail it is necessary to consider the canon law doctrine of recrimination. The ecclesiastical courts applied this doctrine to divorce a mensa et thoro. Under this doctrine a divorce a mensa et thoro was to be refused where both spouses were equally at fault. Only identical matrimonial offences could be recriminated. This canon law rule was based upon the Roman law Dig. 24.3. 1939, although this latter rule applied only to cases where property adjustment between spouses rather than divorce was at issue. See the decision of Proctor v. Proctor, 2 Hag. Cons. 292, 297.

In some of the judgments, the following reasons for the application of the doctrine of recrimination, are also given :

- (1) the equitable maxim " he who comes into court must come with clean hands " and
- (2) the principle of the law of contract " a man cannot complain of a breach of a contract which he has violated."

See Forster v. Forster, 1 Hag. Cons. 146 and Beeby v. Beeby 1 Hag. Cons. 790.

Under the Matrimonial Causes Act, 1857, such recriminatory defences termed " countercharges " were merely discretionary bars to a divorce a vinculo matrimonii) viz. the power was conferred upon the court to decide in its discretion whether or not discretion is to be exercised in favour of the party praying for it.

The narrow view of the ecclesiastical courts that the recriminatory charge must be of the same character as the original charge was abandoned by use of the term

" countercharge" in the relative enactments ; for a " countercharge " may be of a character different from that of the original charge; furthermore, recrimination is no longer a peremptory bar as it was by the rules of the ecclesiastical courts.

The principles as to the exercise of this discretion have developed gradually. In *Anchini v. Anchini* , 2 Curteis , 210 , discretion in favour of the plaintiff was exercised by reason of extenuating circumstances. Again, in the decisions of *Haswell v. Haswell* (1859) 29, LJ, Mat 21 ; *Yeatman v. Yeatman* (1868) LR 1 P & D 494 the principles of the so called rectitude theory have been applied; in the latter decision Lord Penzance pointed out at p. 493 :

" It would be of evil example , if the Court should hold that mere frailty of temper, unless shewn in some marked and intolerable excesses, was reasonable ground to justify a man in throwing a young wife upon the world, without the protection of his home and society ; " and at p. 493 :

" The cause should be grave and weighty which , in the judgment of the court, should deprive a deserted wife of her remedy for that desertion and her right to set it up as a bar to divorce for adultery at her husband's suit."

The main rules governing the exercise of the discretion of the court are laid down in the decisions as follows :

According to the decision of *Wilson v. Wilson* (1920)

P. 20 the court is to take into consideration

(1) the position and interests of the children of the applicant (2) the interest of the woman with whom he has misconducted himself so that she may be in a position to marry him,

(3) the fact that the withholding of a decree will not be likely to reconcile the spouses.

(4) the interest of the husband himself that he may re-marry and lead a respectable life ;

to these have been added by the decision of Apted v. Apted (1930) the following facts to be considered by the Court,

(5) the interest of the community in maintaining the sanctions of honest matrimony

(6) a decree is to be refused if it is likely to encourage immorality;

(7) there must be a strong affirmative case in order to secure relief

(8) all the material facts must be disclosed to the court.(Apted v. Apted (1920) P. 246.

Under the new Act, Sec. 4 it is the duty of the court to inquire, particularly whether there is any connivance or condonation on the part of the petitioner or any collusion between the parties and also to inquire into any countercharge made against the petitioner.

For the widened powers of discretion and of inquiring into all material facts for the exercise of this discretion reference is made to the heading " Procedure " p.200.

Whereas under s. 178 of the Judicature Act. 1925, the court was bound to grant a decree on evidence of adultery, unless the court could find, on the evidence before it, that the petition had been presented or prosecuted by collusion with either of the parties, by sec. 4 of the new MCA, 1937 where there are facts suggestive of

connivance, condonation or collusion, the burden of disproof as to those facts rests now on the party against whom it is suggested.

See Poulden v. Poulden (1938) P. 63.

INSANITY as BAR to DIVORCE.

Since most of the grounds for divorce are based on the guilt of the offending spouse, often the question arises which kind of insanity or what degree of mental defect of the offending spouse may constitute a good defence to the petition of divorce.

Different tests of insanity are applied to the different jural matters: as crimes, contracts, wills, detention in asylum; again, in matrimonial matters, the tests of insanity applied to petitions for divorce differs from those to be applied to petitions for nullity of marriage. In criminal matters there are two kinds of tests of the offender's responsibility, namely

- (a) the "right and wrong" test and
- (b) that of "irresistible or uncontrollable impulse".

The former test of responsibility is unanimously applied by the Courts to criminal cases since MacNaughton's case (1843) 10 Cl. F. 200 :

In 1843 MacNaughton was tried for the murder of a Mr. Drummond, the secretary of Sir Robert Peel, whom he shot in mistake for the latter; the accused made a plea of insanity (insane delusions) and after evidence had been led, the jury returned a verdict of insanity. After that verdict the judges laid down at the request of the House of Lords in their answer to the questions put before them, the rules as to criminal responsibility; by these rules the "right and wrong" test was recognised as the sole test of criminal responsibility; in their answer to the questions concerning the responsibility,

they said as follows :

" We submit our opinion to be that the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong."

In accordance with that opinion of the judges following MacNaughton's case, the English Courts apply the rule that knowledge of right and wrong as to the act charged is the sole test of criminal responsibility; they reject the doctrine of irresistible (uncontrollable) impulse as a defence to crime, viz: - the doctrine by which there exists a type of mental unsoundness resulting in impulses which are quite uncontrollable.

The applicability to civil cases of the rule laid down in that opinion of the judges in 1843 is not clearly established up to now.

Insanity as a bar in its Applicability to adultery and cruelty :

In Long v. Long and Johnson (1890) LJP. 27, a weak/ minded respondent wife pleaded she was not a consenting party to the adultery and the Court refused to grant a decree on the reasoning that she was incapable of understanding the nature of the sexual act of adultery.

In Yarrow v. Yarrow (1892) P. 92 it was doubted by Sir Charles Parker Butt whether even the "right and wrong" test would be a good defence to a petition for

divorce on the ground of adultery; but in *Hambury v. Hambury* (1892) P 222 Sir Charles Butt P. held that it was necessary, in order to make insanity a good plea to a petition for divorce, that the plea should state that the insanity was lasting and abiding and that there was no hope of recovery or amelioration, and not that it was a mere recurrence of intermittent insanity. The questions put to the jury as regards that plea were : whether, when the respondent committed the acts of cruelty and adultery charged against him, he was capable of understanding their nature and consequences, and whether he committed those acts under mental aberration directly or indirectly caused by drink. The jury found that the respondent was capable of understanding the nature and consequences of the acts committed.

The "right and wrong" test rule appears to have been applied to forming the questions put before the jury in that case.

The same test has been applied to the plea of insanity in the recent divorce case of *Astle v. Astle* (1939) P.465 grounded on cruelty, where it has been pointed out that intention and malignity was an essential element in the matrimonial offence of cruelty and there could be no such cruelty if the accused spouse's state of mind was such that he did not know the nature and quality of the act.

It is noteworthy that in *Kellock v. Kellock* (1939)

All E.R.972 it has been held that such disease was no

answer to cruelty where respondent had acted with a consciously wicked mind.

Insanity as a bar to divorce on desertion.

See Townsend v. Townsend LR 3 P & M p. 129. 130 ⁹ it was held in that case, that it was essential for the constitution of desertion that there should be a voluntary abandonment of the other's society against her (his) will; hence it was concluded that insanity interrupted the running of the statutory period of desertion,

Further, in the decision Williams v. Williams (1939) P.315 E365 A.C. ,it was held that a spouse certified is incapable of desertion after certification. With regard ^W to the decision in Pratt v. Pratt (1939) AC 417 in which case it was laid down that " the deserting spouse must be shewn to have persisted in the intention to desert throughout the period ", the court took the view that the respondent husband being mindless was unable to think any thought, to form any intent, or to take any reasoned action.

In Bennett v. Bennett (1939)p.274.

the court refused to grant a decree of divorce because the husband did not discharge the burden of proof that his wife who continued to be insane had continued to exercise a reasoned judgment or had been able to form a rational intention as to cohabitation with her husband.

Finally in Rushbrook v. Rushbrook (1940) P 24 it was laid down that when a spouse charged with desertion is

proved to be insane and accepted in law by certification as such during the relevant period, there is an irrebuttable presumption that such spouse is incapable of an intention to desert.

Insanity on the part of the petitioner as a bar to divorce.

Insanity of the petitioner does not interrupt the running of the statutory period of desertion:-

In the ~~case~~^{one} converse to the previously mentioned, namely, where the petitioner has been an inmate of a mental hospital during part of the statutory period the court did not refuse relief asked for by the petitioner on the ground of the husband's desertion. Sothenden v. Sothenden (1940) C.A. 73.

Effect of insanity of the respondent at the date of institution of the petition for divorce (effect of insanity superveniens).

Supervening insanity of the respondent does not affect the right of the injured spouse to a divorce on the ground of the marital offence committed by the respondent when sane.

See the Scottish case Mordaunt v. Mordaunt LR HL 2 Sc App. 374, in which case it was held that supervening insanity would not be a bar to divorce for adultery while sane. Yet it may now affect the right to divorce in the case of a divorce for desertion,

Since according to s. 2 b) MCA 1937 the state of things amounting to desertion must continue from the date at which it began, throughout the three years immediately

preceding the presentation of the petition, in this respect it differs from the statutory period under Matrimonial Causes Act, 1857, and the Judicature (Consolidation) Act, 1925, respectively in that the period of desertion cannot be completed until the presentation of the petition.

Thus, if the state of the respondent's insanity existed at the time of the institution of the petition the period of desertion cannot be said to have been immediately preceding the presentation of the suit with regard to the decisions cited at p. 109.

In conclusion of this subject it may be noted that in most cases where the plea of insanity by the respondent would be successful, the remedy of s. 2 (d) of the MCA 1937 would be open to the petitioner, if the requirements of s. 3 of that Act were satisfied.

Explain

Mental derangement through intoxication by drugs or alcohol, even though great mental aberration may have been caused, cannot be pleaded in divorce proceedings; on the contrary, it may constitute itself a ground of divorce under the heading of cruelty.

Conversion of judicial separation or of separation order into a decree of divorce.

Under s. 5 of the M.C.A. 1937, a petition for judicial separation may now be presented either by the husband or the wife on the same grounds as have been stated above with regard to a petition for divorce, or on the grounds of failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for

divorce a mensa at thoro might have been pronounced immediately before the commencement of the M.C.A., 1857, namely unnatural offences.

Under s.6 of the M.C.A., 1937, a spouse who has obtained a decree of judicial separation or a separation order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, may petition for divorce and the court may treat the decree of judicial separation or the order of separation as sufficient proof of the ground on which it was granted, but the Court is not permitted to pronounce a decree of divorce without receiving evidence from the petitioner.

Effect of divorce,

Name. Under English law a person is at liberty to adopt any name so long as he does not act thereby by way of deceit to the prejudice of a third person. Hence a woman, after a decree of divorce has been pronounced, may continue to use her married name or resume her maiden name. Cowley v. Cowley (1900) P. 305, Du Boulay v. Du Bouley (1869) LR 2 PC 430.

Succession. When the divorced spouse dies intestate, the other spouse has no right whatsoever of inheritance. But since there is no such a rule as to testamentary succession and therefore a will is not deemed to be revoked by operation of law in case of divorce with regard to a will made before divorce, it is for the spouse who has made such will to revoke it after divorce has been pronounced.

27

Custody of and access to children of the marriage.

The jurisdiction of the Divorce Court as to custody of and access to children is regulated by s. 193 of the Judicature (Consolidation) Act, 1925, and M.C.Rule 55. The Chancery Division has a concurrent jurisdiction in these matters, but if once a divorce suit is pending, it refuses to exercise its jurisdiction in such a case until the matter is referred to it by the Divorce Division in accordance with the provisions just cited.

The Divorce Division, as a rule, grants after decree nisi the custody of the children of the marriage not over 16 years of age to the successful wife, and directs by the relative final order that the children shall not be removed out of the jurisdiction of the Court, except by its leave.

Martin v. Martin (1860) 29 L.J.P.106;

Malinson v. Malinson (1966) L.R. I P & D 221.

Scottish Law on Divorce is rather assimilated to English law on divorce since the passing of the Divorce (Scotland) Act, 1938, (1 and 2 Geo. 6 c ⁵⁰ 65). Apart from this statute a body of case law is still in force which has grown up while the former statutes on divorce were in operation, since the principle of the binding force of precedent also obtains in Scotland. This principle was finally laid down in Scotland by the decision of Rose v. Drummond (1828) S 945. By that decision it was expressly stated that a precedent must be considered as fixing the law, until a different rule was laid down by the House of Lords.

Scottish Law as to Grounds of Divorce.

(A) Grounds of Divorce based on the guilt of the other spouse.

(1) Adultery. Since the Reformation (1560) the Scottish Courts have exercised jurisdiction to dissolve marriage on the ground of adultery of either party,

(2) Desertion. Desertion was recognised as ground of divorce by the Act of 1573, now repealed by the Divorce. (Scotland) 1938, S. 7; an action of adherence was to be a preliminary to an action for Divorce; but since the Conjugal Rights (Scotland) Amendment Act (1861) it has no longer been necessary to institute an action of adherence as a preliminary to suing for divorce, Auld v. Auld (1884) 22 Sc LR 26; Mackenzie v. Mackenzie (1895) AC 384.

The above cited Sec. 7 lays down that Desertion subsists when the defender has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years.

Since the Divorce (Scotland) Act(1938), the question of adherence has been doubtful. By the decision of Macaskill v. Macaskill (1939) Sc 187 and Bell v. Bell (1940) Sc LT 241 it has been held to be essential to the party suing for divorce to use every reasonable endeavour to induce the other party to adhere and to be ready and willing to continue to discharge his (her) all marital duties and that willingness to adhere must persist up

to the date of raising the action for divorce for the statutory period of three years.

(3). Cruelty. The Act defines cruelty as such as would justify according to the law and practice existing at the passing of the Act the granting of a decree of separation a mensa et thoro.

Wilson v. Wilson (1939) SC 102.

(4). Conviction of Sodomy or Bestiality.

(B). Grounds of dissolution of marriage regardless of the guilt of the other spouse.

(a) Incurable insanity. The provisions concerning this ground are the same as those contained in the English Matrimonial Causes Act of 1937; for the details it is referred to p 98.. It may, however, be noted that whereas the English Act deals with care and treatment of insane, persons according to the English statutory provisions only, the Divorce (Scotland) Act of 1938 takes account of English as well as Scottish care and treatment.

(b) Declaration of presumed death. See for the details p.99., as the provisions are nearly the same as those contained in the English Act.

Scottish Law - Bars to divorce.

(a) The Doctrine of recrimination is not recognised under Scottish law in consistorial cases.

Adultery of the petitioner is, as we shall show below, and absolute bar to a divorce on desertion only. Under Scottish law there does not exist a discretionary bar to a divorce; there are not such powers of discretion in this

respect conferred upon the Courts as they are under English law. The defender may only bring a cross-action on the adultery of the pursuer and if it is established that both spouses are guilty, each is granted a decree of dissolution of marriage.

But see
next page
S. 1 of Divorce
(Scotland) Act
1978

The Divorce (Scotland) Act, 1938, did not alter this position. Lord Wark expressed in Bell v. Bell O.H.(1939) SN 71 the opinion that no discretion was enforced, but that, if the ground of divorce was established, the Court must grant a decree.

granted

This point was also stressed in Wooler v. Wooler (1940) Sc. LT Page 66, at p. 68 per Lord Robertson, "Under Scottish law is no question of exercising a discretion." "Adultery is either bar or is not".

This decision was based on the decision in Auld v. Auld (1884) 12 R 36 and Hunter v. Hunter (1900) 2 F. 771.

(b) Absolute Bars.

(1) Adultery of the pursuer committed after commencement of the desertion constitutes an absolute bar to divorce. See Wooler v. Wooler, Hunter v. Hunter, Auld v. Auld and Scott v. Scott (1908) Sc 1124, and Gilfillan v. Gilfillan (1931) Sc LT 454.

(2) . Condonation and Connivance (lenocinium) are also absolute bars to a divorce on adultery.

(3) . Finally, wilful neglect and misconduct are bars to an action for divorce on the ground of incurable insanity.

By Sec. 1 of Divorce (Scotland) Act, 1938, it is provided that the Court shall not be bound to grant a decree of divorce if in its opinion the pursuer has during the marriage been guilty of such wilful neglect or misconduct as has conduced to the insanity of the defender. It is noteworthy that by a recent decision it has been held that adultery is no bar to a divorce for insanity; in that decision, Brown v. Brown (1940) ~~SC~~ 474 Lord ~~Keyes~~ pointed out " I do not think that by analogy this recognised practice of the Courts in actions of divorce for desertion (viz: that adultery is an absolute bar to divorce for desertion) can be extended to actions for divorce for insanity. The reasons in the one case were based on the statute which introduced divorce for desertion. In the present case and under the Act of 1938 any similar reason for refusing decree of divorce, where defender is found to be incurable insane, appears to me to be absent."

Keith J

Effect of Divorce.

(1) At common law as laid down by the decision of Harvey v. Farg~~ular~~ (1872) OH (HL) 26, the guilty party to a divorce loses all claim to his or her legal rights on the death of the other spouse and the innocent spouse may exact his (her) legal rights as if the other spouse were dead.

2/21

Where both parties are declared to be guilty of divorce^{and are} neither can take any benefit through the dissolution of the marriage. Frase^{and are} v. Walker (1872) 10 M 83.

2/

(2). As to custody of children. By the Conjugal Rights (Scotland) Act 1861) 24 & 25 Vict. c. 86) The power was conferred upon the Court to make in actions of divorce such orders as to custody, maintenance and education of pupil children of the marriage as it thinks fit with regard to their welfare.

(3) Remarriage. Each spouse is at liberty to remarry after divorce a third person with one exception: by the Act (1600) c. 20 a marriage contracted by a spouse divorced for adultery with his (her) accomplice is deemed to be null, if the name of the latter is mentioned in the decree of divorce. See Beattie v. Beattie (1866) 5 M 181.

Northern Ireland. Law on divorce.

In Northern Ireland where only a legislative divorce by an act of the Parliament of Northern Ireland was obtainable up to now, the powers to grant divorce from bond of matrimony has been conferred upon the High Court by the recently passed matrimonial causes (Northern Ireland) Act ,1939, (2 and 3 Geo. VI ch. 13). This Act is on similar lines as the English MCA. 1937 with some modifications: The three years' interval interposed between marriage and bringing an action of its dissolution is omitted and it is only laid down that the court should not pronounce a decree of divorce on the ground of cruelty alone until the expiration of the three years' period, unless the court is satisfied as to exceptional hardship of the petitioner or depravity of the respondent.

that
m/c

In an action for divorce on presumed death of the other spouse a decree of dissolution of marriage alone is to be pronounced without decree declarative of presumed death as provided by the English enactment. It may further be noted that, whereas the English Act deals with care and treatment of insane persons according to the English statutory provisions only, the Matrimonial Causes (Northern Ireland) Act 1939 takes account of English as well as Scottish care and treatment. Section 8 of the Act of 1939 imposes also restrictions on the remarrying ~~divorcee~~ with regard to certain degrees of relationship.

The Matrimonial Causes (Northern Ireland) Act 1939 differs, on the other hand, from the Divorce Scotland Act 1938 in that it confers discretionary powers upon the High Court similar to those of the English Divorce Division and again in that section 26 provides for a relief of a deserted wife in the same way as section 13 of the English MCA Act. The Divorce (Scotland) Act 1938 contains neither of these provisions.

Self governing dominions.

Common law ~~rules~~ in general in the various parts of the British Empire; yet there exist some sixty legislatures in the British Commonwealth; hence a great variety of statutes relating to matrimonial causes and divorce can be found there and it is clear that an outline only of the most striking features can be given in respect of divorce legislation and that details however interesting they may be must necessarily be omitted.

The most significant features of the statutory provisions

900000

relating to grounds of divorce are : In :

(a) Australia: (1) Long terms of imprisonment are admitted as ground of divorce almost universally throughout Australia.

(2).In Western- Australia sec. 7 of the Act of 1919 Nr.33 enacts that divorce may be obtained on the ground of ante- nuptial incontinence of either spouse; in this case divorce procedure is used as a substitute for annulment, in order to avoid disadvantages which annulment of marriage ab initio carries with it, e.g. bastardization of its issue.

(3). In Victoria by the matrimonial causes and divorce Act of 1936 Nr. 4210 the ground of divorce of " habitual drunkenness" has been extended to include " taking or using to excess any sedative narcotic or stimulating drug or preparations. "

(b) Canada. Divorce a vinculo matrimonii may be granted only by the Divorce courts of Alberta, British Columbia, Manitoba, Nova Scotia, New Brunswick and Ontario. In the other Provinces such divorce may be obtained by a private Bill in the Senate. only.

(c) Absolute divorce is unknown to the law of the Irish Free State.

(d) The Law of Newfoundland recognises no divorce, except by private Bill.

(e) New Zealand: By the Divorce and Matrimonial Causes Act of 1928 separation by mutual consent for three years is among others admitted as ground of divorce.

(e). British colonies.

Insofar ~~Common~~ Law prevails in the British colonies the courts exercise jurisdiction in divorce including recognition of foreign judgments in accordance with the same principles as those followed in England.

(1). Isle of Man:

The courts of the Isle of Man do not exercise jurisdiction in divorce a vinculo matrimonii; divorce ~~can~~ only be obtained by special Act ^{of the} by Tynwald.

(2). New Guinea:

It is noteworthy that under the Divorce and Matrimonial Causes Ordinance 1934 relating to this colony contains among others the following ground of divorce: A wife may petition for divorce in the case of a husband's failure during the previous three years to pay ~~to~~ her maintenance ordered to be paid by any court or agreed to be paid under any deed of separation.

Furthermore, a petitioner whether husband or wife may claim damages from an alleged adulterer provided the adultery is not condoned and was committed within the previous two ¹/₂ years. An alleged adulterer need not be made a party to the petition and served, unless damages or costs against the adulterer are claimed.

2. U.S.A. Law on divorce.

Grounds of divorce.

In all States of U.S.A., except South Carolina, divorce absolute is recognised. There exists a great variation in the statutes as to the grounds of divorce; common to all statutes recognising divorce absolute is adultery as ground of divorce; it is the only one recognised by the law of the State of New York.

The statutes vary as to the grounds of divorce; there are 39 grounds of divorce altogether stated by the different statutes, the number of these grounds adopted by each of them also differs greatly. Among these grounds are, apart from those on which divorce absolute is granted under English law, to be found for instance: Conviction for crime, non- support, impotence, intoxication; yet incompatibility of temper as such is not named in any statute as ground of divorce, but the same result is reached in some statutes by basing divorce under the respective provisions on the existence of a voluntary separation continued for a fixed period. Some statutes admit divorce on grounds which must exist at the time of celebration of marriage; in these cases divorce procedure is used instead of that for annulment of marriage; in that way some of the disadvantages are avoided which an annulment of marriage carries with it. Finally, it is important to note, that under the Michigan statute the Court has the power to grant an absolute divorce although merely a judicial separation is asked for.

Grounds of divorce regardless of guilt.

(1) Under the different statutes the only ground of divorce which contains no element of guilt is insanity. In some statutes a general clause exists and there under such a general clause insanity may also be considered a ground of divorce. The statutory period during which insanity must have existed in order to constitute a ground of divorce varies from two to twenty years.

(2). In case of presumed death, a second marriage is, as a rule, voidable; under some statutes the returning spouse of the first marriage may elect which of the two marriages should be dissolved. The Arkansas statute only provides that such second marriage (after the other spouse has been absent for five years) "shall be as valid as if such husband or wife were dead."

Bars to divorce.

(1). Not all statutes on divorce deal with the defences to divorce; at any rate, collusion, condonation, connivance are there held bars to divorce by the Courts on the same lines as by the English decisions.

(2) Recrimination.

There are many types of the application of the doctrine of recrimination in the statutes of the different states. The rule whereunder a respondent may in a suit for divorce based on any ground recriminate by showing that the plaintiff is guilty of any marital offence is generally recognised where no statutory provision concerning recrimination exists, and this rule is also embodied

in some statutes; in Hawaii recrimination on any cause is limited to divorce for adultery. By another group of statutes recrimination is limited to adultery whatever the ground may be on which the suit for divorce is founded. The old Canon law theory that the wrong to be recriminated must be of the same nature is also adopted by some statutes, and limited by others to divorce for adultery.

Lastly there is a type of recrimination by which the respondent may in any divorce suit recriminate by showing that the plaintiff is guilty of a cause of equal wrong. Thus the statutes exhaust with regard to the doctrine of recrimination nearly all the possible combinations of events.

Recrimination, if permitted at all, is an absolute bar to divorce, except for Kansas, Minnesota and Oklahoma, where it is left to the discretion of the Court to grant or to refuse a decree of divorce in such cases.

A matter of recrimination on which a respondent could rely must be pleaded and proved by him, it is not to be taken into consideration by the Court ex officio.

See Bishop, Marriage and Divorce para. 408.

Chapter VIII.

Continental systems of law on divorce.

French Law: Grounds of divorce.

Absolute (peremptory) grounds of divorce are :

- (1). Adultery. (Art. 229, 230, C.C.)
- (2). Condemnation to a degrading punishment (Art.232).

When these grounds are proved the court is bound to grant divorce.

Relative (facultative) grounds of divorce (Art.231) are:

- (1) Threats or conduct dangerous to life or health of the other spouse (excès).
- (2) Extreme cruelty (sévices).
- (3) Any serious breach of marital duty (injure grave).

The later ground finds a very wide interpretation, by the courts so as to include drunkenness, insulting words, quarrelsome nature, desertion, accusing the other spouse of infidelity without justification, etc.

Interpreting Act 231 C.C. the courts have discretionary powers to grant or refuse divorce as the particular circumstances of the case may be.

The following decisions are illustrative of the liberal interpretation given to this Article by the courts:

Rouen, April 29, 1910, D 1912, 5.2.S .1911, 2.37. (Refusal of religious celebration of the marriage was considered such breach of conjugal duty as to justify divorce).

Dijon, July 30, 1868, D/68.2.247. (Desertion was held injure grave). Abusive control of the wife's relations or of her correspondence (Paris, July 13, 1898, D.99.1.358,

Requ. Aug.6, 1907, D.1907, 1512) as well as a charge of conjugal infidelity without justification were held sufficient to justify a divorce. (Caen, Febr.11, 1880, D 81.2.183).

Drunkenness or abuse of morphia may be considered "injure grave" to the other spouse.

Alger, June 11, 1892 , D. 92. 220, and also refusal of consummation of marriage.

Requ. April 6, 1908. D. 1908.1. 240.

Since the French law on divorce is founded solely on the fault basis of either spouse, insanity is no ground of divorce thereunder.

Dijon, Nov. 29, 1923. D. 1924. 2, 46;

Poitiers, March 25, 1890, D 90, 2. 340.

Lyon, Nov. 20. 1903, D. 1904, 2. 130. S. 1904, 2. 295.

Bars to divorce.

Art. 244 C.C. mentions only death of one spouse and the reconciliation of the spouses as special defences to an action of divorce, yet the following facts are considered bars to divorce under French Law:

(1) Condonation.

Erreux Dec. 2, 1924 , Gazette Palais Feb. 5, 1925.

It may, however, be observed that continuance of life in common is not of itself deemed to be necessarily condonation of the marital offence.

Cass. Dec. 11. 1893, D. 1894, 1. 341.

(2). Recrimination.

There have been decisions recognising that principle of canon law, called recrimination. (Compensatio criminum), that is to say that adultery of the petitioner (equality of guilt) bars a divorce on the ground of adultery.

This canonical doctrine was introduced into the French

jurisprudence on the reasoning that there was an analogous case in the French Penal Code supporting this view, namely, Art. 336 of the French Penal Code, by which a husband could not charge his wife with adultery when guilty of keeping a concubine in the common dwelling. The vast majority of French writers object to the theory that mutual wrongs should compensate each other.

Although the modern trend of French jurisprudence rejects the doctrine of recrimination, almost the same result is reached by way of three other doctrines which have developed there, viz. the theories of :

(a) Provocation. Provocation of the acts complained of is a bar to divorce where it has proximately caused the marital offence relied upon as ground of divorce.

Requ. 12.I. 1903, S. 1903, 1.279.

(b). Extenuation. As definitions of the relative (facultative) grounds of divorce named above are not given by the Civil Code, the courts, in considering all the circumstances of the particular case, often hold the wrongs of the petitioner as extenuating the marital offence complained of and thus as barring divorce.

(c). The most recent theory is that of Carpentier:

He points out, that in case where a divorce is sought upon a peremptory (absolute) ground the court must grant the divorce, irrespective of the existence of an equal wrong on the part of the petitioner. Where, on the other hand, the petition for divorce is grounded on one of the facultative (relative) grounds, an absolute ground as defence to such petition will operate to procure a

divorce for the respondent.

(3). Lapse of time as a bar to divorce.

(a) Lapse of time is a bar only insofar as it constitutes prescription of the action. i.e. when 30 years have elapsed since the cause for divorce arose, according to art. 2262(2) relating to the ordinary prescription.

Rennes, Dec. 28. 1825.

(b) Where proceedings for divorce have been commenced and not duly prosecuted so that more than three years have elapsed since the last step in procedure the action may be dismissed according to art. 394 CC.P.

(4). Finally, it is noteworthy that separation-agreements are invalid according to art. 307 C.C. and that therefore such agreements are no bar to a divorce on desertion.

Effect of divorce.

(1). Name. By art. 299 C.C. as modified by the law of February 6, 1893, the divorced spouses must resume their family names.

(2). According to art. 300 C.C. the husband or wife who has obtained the divorce retains the advantages made in his or her favour by the other, even if it has been agreed that they were reciprocal and if the reciprocity does not take place.

(3). Maintenance. When divorce is decreed on the fault of one spouse, the latter is liable to accord to the innocent spouse if unable to support himself (herself), an allowance not exceeding in amount one-third of his (her) income. (Art. 301, C.C.)

(4). Damages. The guilty spouse may also be ordered to pay special damages to the other by reason of his (her) tortious conduct, according to art. 1382 C.C. which runs as follows :

" Every act whatever of an individual which causes injury to another obliges the one owing to whom it has occurred to make up for it."

(5). Custody and maintenance of children. The care and custody of children of marriage belongs to the innocent spouse, unless the Court upon motion of the family or of the public prosecutor directs it otherwise. Art. 302. C.C. Regardless of who has the custody of the children, both divorced spouses are entitled to control their education ^{and} and liable to contribute to their maintenance. (Art. 303).

Conversion of judicial separation into divorce.

According to art. 306 C.C. a judicial separation may be granted on the same grounds as those justifying a divorce. (séparation de corps..)

When a judicial séparation has been in force for three years it may be at the instance of either party converted into a decree of divorce ; according to art. 310, C.C.

^{May} Conversion was changed from permissory to mandatory by the law of June 6, 1908.

Remarriage after judgment declarative of absence.

Remarriage by the remaining spouse may take place after judgment declarative of the other spouse's absence has been given by the court. (art. 119, C.C.)

When a person has been missing ~~and~~ not heard of for four years, interested parties may apply to the Court to have the absence proclaimed. The court will order an inquiry and after expiration of one year after ordering the investigation the court will give a judgment declaring absence.

Since the absent spouse, whose consort has married again has alone the power of disputing the validity of the second marriage, the continuance of the latter depends solely on whether or not the returning spouse takes proceedings for its annulment. (art. 1392, C.C.)

Austrian Law on Divorce.

Prior to 1938.

(a). The marriage of persons being of Roman Catholic faith is indissoluble except by death of either, or on dissolution by judicial declaration of the presumed death of one of the spouses, para. 111 of the Austrian Civil Code, See...

(b). Under Austrian law a divorce a vinculo matrimonii may be granted to persons who confess neither Roman Catholic faith nor Jewish faith, under the following conditions:

As far as absolute divorce is permitted it is based upon the guilt of either spouse; the innocent spouse only may petition for divorce on the following grounds:

(1) Adultery,

(2) Conviction of a crime involving imprisonment of at least five years.

(3). Malicious desertion (4) attempts to kill the other spouse or to inflict grave injury on him or her, (5) repeated grave insults and maltreatments, (6) invincible aversion, on the part of either spouse or of both spouses (para. 115 of the Austrian Civil Code and the Law of April 9, 1870, Imperial Law Gaz, 51/)

A/ According to these rules both spouses have to submit the relative applications to the court and to prove clearly *respectively* their invincible aversion by some facts, since mutual consent of the parties does not suffice.

Disease including insanity is not recognised as ground of divorce under Austrian law; but since invincible aversion on the part of either spouse is sufficient to justify divorce, the sound spouse alleging invincible aversion on his or her parts may submit the relative application for divorce to the court in agreement with the curator of the insane spouse.

Bars to divorce.

(1) Conduct conducing. Since an innocent spouse only may petition for divorce, it has been held by the court that conduct conducing to the divorce ground relied upon bars divorce. (Decision, Slg Nr 3722).

(2) Continuation of cohabitation by the innocent spouse although he or she has become aware of the facts constituting a ground for divorce, is considered a bar to divorce. (paras. 115 and 96 of the Austrian Civil Code).

U (3) There is, on the other hand, not recognised under Austrian Law compensation of divorce grounds, that is to

say: where both spouses have committed marital offences constituting grounds of divorce, each of the spouses may petition for divorce, if his (her) conduct was not ^{did} conducting to the marital offence of the other spouse.

Decisions of the Supreme Court :

Slg VIII 2932, 3014, XI 4234. XIV 5451.

In the decree of divorce it is to be declared whether ~~or~~ not either of the spouses is guilty of a marital (offence) ~~and~~ which one is, even in the case of a divorce founded upon the ground of invincible aversion.

Decisions of the Supreme Court: (Slg. Nr.14.137, Slg IV, 1303).

Where the respondent has brought a cross-petition and the marriage is dissolved on the ground of the guilt of both spouses, both spouses are to be adjudged **guilty**.

(c). A marriage contracted between persons of Jewish religion may be dissolved:

- (1). By mutual consent of the spouses to
- (2) On the ground of adultery committed by the wife.

No other ground of divorce is admitted to spouses of Jewish religion.

The dissolution of the Jewish marriage is effected by the delivery to the wife of the so- called Gett. It is a formal letter of divorce; this delivery is to be performed before the court, a rabbi being present.

(paras. 133 to 135 of the Austrian Civil Code.)

Dissolution of marriage by judicial declaration of presumed death of either spouse. The adjudication of death

may be made , in general,

(1) if no information that the person who disappeared is alive, had been received for ten years ~~and if he~~ would have completed his thirtieth year,

(2) One who has disappeared and would have completed his seventieth year, may be adjudged dead if no information of his being alive has been received for five years,

(3) when the person concerned has been in mortal danger , the adjudication of death may be made after three years from that event, (para 24 of the Austrian Civil Code).

In all these cases the remaining spouse may submit an application for a judicial declaration of the dissolution of the marriage.

The relative procedure is regulated by the law of February 16, 1883, Imperial Law ~~43~~.20.

only
After such judicial declaration of the dissolution of the marriage ^{is} ~~only~~ remarriage by the remaining spouse ~~is~~ permitted. 77

Yet such dissolution of the marriage is conditional upon the fact that the person who ~~has~~ been judicially declared dead, was in reality dead at the time of celebration of the second marriage.

Judicial separation. By Austrian Law the institution of judicial separation is also recognised and may be granted on the following grounds:

(a). By mutual consent , (b) adultery, (c) conviction of a crime, regardless of the length of the term of im-

*Austrian Code
paras. 103, 104.*

imprisonment, (d) malicious desertion, (e) immoral conduct, (f) attempts to inflict grave injury to body and health of the other spouse, (g) grave assaults, (h) repeated and very grave insults.

The grounds named in (b) and (h) may by way of analogy be extended to other similar causes by the courts and in fact the following were added:

(To (b): minor contraventions against conjugal fidelity (decisions of the Supreme Court, Slg. XI Nr. 4394, XIV Nr. 5627).

(To (c): Although thefts between spouses never constitute a crime in the Continental sense of the term (rather corresponding to the English term "felony") but only misdemeanour according to para. 525 of the Austrian Penal Code, the courts regard such thefts as a ground for separation.

(Decision of the Supreme Court Slg. Nr. 10.109).
Remarriage
by way of an administrative act of dispensation of the impediment of "bond of matrimony" (para 84 of the Austrian Civil Code).

Under Austrian law the only remedy available for persons of Roman Catholic faith who tried to get rid of the bond of matrimony was the permission of remarriage granted by an administrative governmental act of dispensation.

Since the Armistice of 1918 para. 83 of the Austrian Civil Code ^{has} found a more liberal interpretation and it was held ^{has been} that a dispensation ~~of~~ every impediment ~~of~~ marriage might be ^{from} granted; some writers took the view that the impediment of "bond of matrimony" was not included in this para. 83, l.c. and dispensation of this impediment must not be granted. The powers of granting such dispensation are by para. 84 of the Austrian Civil Code conferred upon the provincial govern-

ments; the provincial governors granted them since 1918 following the liberal view in construing para. 82 l.c. dispensation of the bond of matrimony to spouses of Roman Catholic faith and allowed their remarriage, but since the judicial investigation of the validity of marriage takes place ex officio at the instance of anyone who is ^{to} showing some civil claim depending thereon, the courts according 944 of the Austrian Civil Code and to the Imperial Decree of Aug. 23 1819 JGS.Nr. 1595, ^{have} declared such remarriages null and void on the reasoning that dispensation of the impediment to remarriage cannot be granted; it is doubtful whether the courts had the competency to investigate into the merits of the dispensation as this administrative act of dispensation was a final one. The defensor of the bond of matrimony who was officially appointed in proceedings concerning the nullity of marriage, took in several instances proceedings to the Constitutional Court against the nullity decrees pronounced by the courts in order to defend the "Dispensehe" on the reasoning that the Civil Court was not competent to review the dispensation. "

The Constitutional Court followed this view in some of its decisions declaring that there is a conflict of competency between the Civil Courts and the administrative bodies of the Provincial Governments, which alone were competent. Dec. of the Constitutional Court of Nov. 5, 1927, February 27, 1928, Constitutional Court Slg 878, 951. In its later decisions, however, the

Constitutional Court held that there is no conflict of competency existing, since the Civil Court in pronouncing the "Dispensehe" null and void decided this issue principally, whereas the question of finality of the dispensation act of the Provincial Government was merely a secondary issue to it.

Decision of the Constitutional Court of July 7, 1930, Slg. 1341 (1932).

Thus the view of the Civil Court was affirmed.

This state of things complicated the legal position the more as a series of laws and by laws, as for instance concerning salaries of public officials, insurance, etc. recognised the validity of such remarriages entered into by way of dispensation.

Since August 1, 1938 the statute of July 6 1938 Imperial Law Gazette I. page 807 concerning family law is in force both in Germany and in Austria. By transitory provisions of this Statute the recognition of such remarriages (by dispensation) "Dispensehe" and the conversion of a judicial separation into an absolute divorce of marriages of Roman Catholic parties are provided for.

German law on divorce.

Prior to 1938.

Under the German Civil Code of 1900 the grounds for divorce are to be classified into absolute (peremptory) and relative (facultative); if the former are proved the Court must grant divorce, whereas in the case of a relative ground it is left to the discretion of the Court to allow or refuse divorce.

Absolute grounds are :

- (1) Adultery, bigamy and sodomy. (Para. 1565 of the German Civil Code.
- (2) Attempts against the other spouse's life (para.1567 l.c.)
- (3) Wilful desertion (para. 1568 l.c.) ;

The following are regarded as acts of wilful desertion:

(a) Intentional disobedience to an order of restitution of conjugal community, continued for more than a year against the will of the other spouse.

(b) Intentional absence from the marital community against the will of the other spouse, continued for more than a year under circumstances which would justify service of notice by publication against him .

The relative (facultative) grounds of divorce are :

(1) Where the other spouse by grave violation of the duties of marriage or by dishonourable or immoral conduct has caused so grave a disorder of the matrimonial relation that the spouse cannot be presumed to continue the marriage: gross maltreatment is also regarded as such grave violation.

(2) Where the other spouse has become mentally diseased.

If the disease has, during the marriage, continued at least three years and has reached such a degree that the intellectual community between the spouses has ceased, and that every prospect of restoration of such community is excluded.

The law of 1938:

Under the new law on divorce of July 6, 1938, (Imperial Law Gazette I, p. 807, in force since Aug. 1. 1938) the following grounds of divorce are :

(a) Absolute grounds:

(1) Adultery (para. 47).

(2) Where the other spouse without reasonable cause refuses persistently to have issue or to become pregnant or unjustifiably uses or causes to use contraceptives.

(b) Relative grounds are :

(1) Where the other spouse owing to some other grave breach of marital duty or dishonourable or immoral conduct on his (her) part has disturbed the marital relation culpably to such an extent that the restoration of a conjugal community corresponding to the substance of marriage cannot be expected. (para. 49). The refusal to restore the conjugal community may according to para. 83 of the new law be deemed to be a grave breach of marital duty (constituting a ground of divorce) (para. 49 d.h.g.). Para. 83, d.h.g., mentioned above reads as follows:

" Who by condonation or lapse of time has ceased to be entitled to divorce must not refuse to restore the conjugal community by reason of that fact only which has constituted that right to divorce."

(2) Where the relation of marriage owing to the conduct of the other spouse which resting upon mental disturbance such as hysteria cannot be regarded as a marital offence, is disturbed to such an extent that the restoration of conjugal community corresponding to the substance of marriage cannot be expected (para. 50 l.c.)

(3) Where the other spouse has become mentally diseased and the disease has reached such a degree that the intellectual community is severed and the restoration of such community cannot be expected. (para.51 of the law, 1938).

(4).Where the other spouse is afflicted with a contagious or loathsome disease and its cure or the removal of danger of contagion cannot be expected within measurable distance. (para. 52 l.c.).

(5) Where the other spouse after celebration of marriage has become prematurely sterile.(para. 53 l.c.)

(6). Where the domestic community of the spouses has been discontinued for three years and owing to the grave incurable disorder of the matrimonial relation, the restoration of the conjugal community corresponding to the substance of marriage cannot be expected, either spouse may petition for divorce. (para.55.l.c.)

As above in point (a)(2) stated a new absolute ground of divorce is introduced, those absolute grounds, on the other hand, which were contained in paras. 5165 and 5166 of the German Civil Code, namely bigamy, sodomy and attempts against the other spouse's life, as well as that

of wilful desertion (para. 1567 of the German Civil Code), are not among the specified grounds of divorce in the new law, but they are covered by the general clause of para. 49 of the new law; this general clause differs from that of para. 1568 German Civil Code;

in that it does not now depend upon whether the petitioner may fairly be expected to continue ~~that~~ marriage, but whether the continuance of the marriage relation is in the public interest.

Furthermore, where as under the German Civil Code insanity only was operative as ground of divorce irrespective of guilt, by the new law the following grounds of divorce are added which are not based upon guilt of the other spouse, namely : mental derangement, not reaching the degree of insanity (para. 50 l.c.) contagious or loathsome disease (para 52 l.c.) sterility (para. 53 l.c.) and under the general clause; discontinuation of domestic community . (para. 55 l.c.)

In the new provision concerning insanity as ground of divorce (para 51 l.c.) the time limit as to its being continued for three years during the marriage has been cancelled.

On the whole, ~~the new law of divorce~~ is based on the anti-individualistic doctrine; ~~on deciding a divorce case~~ the judge is bound to have regard only to the question whether or not the continuance of the marital relation of the parties could be of some value to the community; the individualistic interests of the parties to the

2/

divorce proceedings are immaterial and are to be disregarded by him.

The general clauses of paras. 54 and 55 l.c. are of such a large scope as to include any power of the judge necessary to arrive at this result.

Bars to divorce.

Prior to 1938.

(1) Bars to the divorce grounds of adultery, bigamy and sodomy according to para. 1565: where the petitioner has assented to the adultery, or to the punishable action or has become guilty of participation.

(2) In all cases, except the case of insanity, condonation of the marital offence is a bar to divorce. (para. 1570).

(3). Lapse of time. The petition for divorce in all cases, except the case where insanity is the ground of divorce relied upon, must be brought within six months from the time when the spouse obtains knowledge of the ground for divorce.

The petition for divorce is barred if ten years have elapsed since the ground for divorce arose.

The law of 1938.

Under the new law of 1938 the following are bars to divorce:

To adultery: (1) The right of the spouse for divorce is barred if he assents to the adultery or by his conduct wilfully makes it possible or facilitates it.

(2) A further bar to divorce based on the ground of adultery is according to para 56 condonation and a conduct of the injured spouse showing that he (she) does not regard the marital offence as disturbing the marital relation.

Bars to sterility:

(1). Divorce is barred where the spouses have their own hereditarily fit offspring or a hereditarily fit child jointly adopted by them

(2). The spouse being himself or herself sterile is not entitled to sue for divorce; the same applies to a spouse who would be disallowed to contract a new marriage for health reasons or whom the Board of Health would dissuade therefrom.

Bars to the grounds of divorce on mental disturbance

(para. 50 l.c.) on insanity para. 51 l.c. on contagious or loathsome disease. (para 52) on sterility (para. 53 l.c.):

Divorce must not be granted if it is not morally justifiable. This is, as a rule, deemed to be subsistent where the dissolution of the marriage would be extremely prejudicial to the other spouse; this latter is to be concluded from the various attendant circumstances, such as from duration of the marriage, age of the spouses and from the cause that occasioned the disease or the sterility , (para. 54 l.c.) .

Bars to discontinuance of domestic community:

Where the spouse whose, sues for divorce is alone or principally guilty of the disorder of the domestic community, the other spouse may object to divorce; the objections is to be disregarded if the continuance of the marriage relation is morally unjustifiable with due regard to the substance of marriage and the entire conduct of both of the spouses. (para. 55 l.c.)

General clause:

Bar to all divorce ground, based on the guilt of either spouse.

The right to divorce on the guilt of the other spouse is barred by condonation or conduct of the injured spouse showing that he or she does not regard the marital offence as disturbing the marital relation. (para. 56 l.c.)

(a) Lapse of time as bar to divorce.

The provisions concerning the lapse of time as bar to divorce are under the law of 1938 the same as under the Civil Code with one exception, namely, the case of sterility.

The suit for divorce based on the guilt of the other spouse must be brought within six months from the time when the spouse is aware of the ground for divorce. The limitation does not run as long as the domestic community of the spouses is discontinued. If the guilty spouse requires the other, either to restore the domestic community or to bring the petition, the limitation commences from the receipt of the request. The petition for divorce is inadmissible if ten years have elapsed since the ground for divorce arose; yet petition for divorce is admissible in spite of such lapse of time if the ground for divorce relied upon is an adultery which is prohibited by para. 2 of the law concerning protection of German blood and honour, Statute of Sept. 15, 1935, Imperial Law Gaz. I. p. 1146. (The above mentioned para 2 of the law of Sept. 15, 1935 prohibits the illegitimate intercourse between Jews and citizens of German blood and those of kindred race.

(57, l.c.)

(b) The right to divorce on the ground of sterility ceases unless the petition is brought within one year from the time when the spouse is aware of the sterility of the other or from the time when he obtains knowledge of the fact that the bar to divorce according to para. 53(II l.c), namely, that his or her hereditarely fit child of the marriage or the jointly adopted child does not exist any more.

Divorce is ~~in such cases excluded if~~ the spouse petitioner has attained the thirtieth year of age and ten years have elapsed since the celebration of the marriage. (para. 58, 1c) Finally, it is provided by para. 59 l.c.

(1) that a ground for divorce may even though the limitation provided in paras. 57, and 58 for its enforcement has expired, be asserted in the course of the suit, if the limitation has not expired at the time of the institution of the suit, and

(2) that a breach of marital duty which can no longer support a suit for divorce, may be asserted in support of an action for divorce based upon another breach of marital duty.

Dissolution of marriage by remarriage after judicial declaration of presumed death of the other spouse has been given.

If after the spouse has been declared dead, the remaining spouse contracts a new marriage, this is not void even if the spouse adjudged dead is still living, unless both spouses, at the time of marriage, knew that he or she has survived the declaration of presumed death.

Upon the consummation of the new marriage, the former marriage is dissolved by law even if the declaration of death is revoked. (para 43, l.c.).

If the spouse who has been declared dead is still living the other spouse of the former marriage may within one year of the time when he has become aware of the survival sue for dissolution of the new marriage unless he had at the time of the second marriage knowledge of his first spouse's being alive. In the case of dissolution of the second marriage mentioned above, the spouse who has sued for dissolution may contract a new marriage, during the lifetime of the other spouse to the former marriage, with the latter only. (para. 44 l.c.) Under the German Civil Code either spouse to the second marriage had a right of contesting it.

The statutory provisions concerning death declaration are as follows :

- (1) The declaration of death may be made when no information that the person who disappeared is alive, has been received for ten years. The declaration is not to be made before the end of the year, in which such person would have completed his thirty- first year.
- (2). One who has disappeared and who would have completed his seventieth year, may be declared dead if no information of his being alive has been received for five years.
(para. 14 German Civil Code).

By paras. 15 to 17 German Civil Code periods are fixed of one to three years according to the kind of mortal danger to

which the person who disappeared has been exposed under circumstances other than mentioned above.

Adjudication of guilt in the decree of divorce.

As to divorce founded on the guilt of the respondent:

If the marriage is dissolved on the guilt of the respondent this is to be declared in the decree of divorce, and one or both of them may be adjudged guilty in the decree.

Where the defendant has brought a cross petition and the marriage is dissolved on the ground of the guilt of both spouses both are to be adjudged guilty. If the guilt of one spouse is considerably graver than that of the other, it is also to be stated in the decree of divorce that the guilt of the former is preponderant.

Even if no cross petition is brought, upon motion of the respondent, the spouse petitioner is also to be adjudged guilty, if the dissolution of the marriage is decreed upon a marital offence of the respondent, and if the latter at the time of the institution of the suit or afterwards would have been entitled to sue for a divorce *for* on the fault of the petitioner.

If the respondent at the time of the institution of the petition has lost the right to petition on the guilt of the petitioner, then the motion is yet to be granted if it were deemed to be equitable. (para.60 l.c.).

the ground

The same applies to the petition founded upon ~~a~~ *another* ground ~~another~~ than the guilt of the respondent according to para 61 l.c. of the law of 1938.

adjudged alone or principally guilty, shall accord to the husband the maintenance fitted to his station in life

Effect of divorce.

Name: The divorced wife retains the family name of the husband. (para 62, 1.c.)

The divorced wife may resume her family name by a declaration made before the registrar; the declaration is to be made in publicly authenticated form. The divorced wife may also resume the name acquired by her through a marriage prior to the dissolved one if there is issue from that former marriage and unless she is alone adjudged guilty. (para. 63 1.c.)

If the divorced wife is adjudged alone or principally guilty, the husband may forbid her to bear his name, by a declaration made before the registrar; the declaration is to be made in publicly authenticated form. The registrar is to communicate the declaration to the wife. With the loss of the name of the husband, the wife again receives her family name. (para 64, 1.c.)

The divorced wife may by reason of her misconduct subsequent to the divorce be forbidden by the court of guardianship upon motion of the husband or if he be dead, of his near relative, to bear the married name.

The husband who is adjudged alone or principally guilty, shall accord to the divorced wife the maintenance befitting her station insofar as she cannot gain it from the income of her property or from the earnings of her labour, if in the condition in which the spouses have lived, earning by her was customary, The wife who is adjudged alone or principally guilty, shall accord to the husband the maintenance fitted to his station insofar

as he is unable to support himself.(para 66,l.c.).

Maintenance.

Insofar as a spouse adjudged alone or principally guilty were perilling his own maintenance suitable to his station with regard to his other obligations, he needs only to accord such maintenance to the other spouse as it is deemed equitable with regard to the wants as well as to the means and earnings of the spouses; if he has to accord maintenance to an unmarried minor or in consequence of his remarriage to the new spouse, the wants and economic conditions of these persons are also to be taken into consideration. The husband is, under the conditions just mentioned above, entirely free from the obligation of maintenance, if the wife can procure the maintenance from the principal of her property. (para 67lc).

When both of the spouses are adjudged guilty, but none guilty to a greater extent than the other, the spouse who cannot support himself may be granted an allowance of support, if and insofar as it is deemed equitable with regard to the wants and the means as well as earnings of the other spouse, and of those persons upon whom he depends for support. (para 68,l.c.)

The same rule applies to the case where no adjudication of guilt has been made in the decree of divorce.

The party entitled forfeits his right to maintenance if after the dissolution of the marriage he or she commits a grave offence against the obligee (the divorced spouse) or leads against the will of the latter a dishonourable

or immoral life. (para 74,l.c.).

The claim for maintenance ceases by the remarriage of the party entitled. (para. 75,l.c.)

Succession.

The divorced spouse has no right to inherit from the deceased spouse. The right of inheritance as to a testamentary gift is barred if the decedent at the time of his death has been entitled to sue for divorce on the guilt of the other spouse and had already instituted the respective suit for divorce.(para 2077 of German Civil Code).
Care of children.

After the marriage has been dissolved the Court of Guardianship is to determine to which of the spouses the care of the person of a mutual child is to belong. Decisive is what according to the circumstances of the particular case is deemed to be best for the welfare of the child.

Where ~~there are~~ several mutual children the care of the persons of all children is to be conferred upon the same parent, unless a different settlement is for special reasons required in the interests of the child.

The care of the person of a child is not to be conferred upon the spouse who is adjudged alone or principally guilty unless it is for special reasons deemed useful to the welfare of the child. If it is deemed necessary for the welfare of the child the court of guardianship may confer the care of it upon a guardian.

The court of guardianship may make a different order,at

any time, if it is, required in the interests of the child.

Before issue of the new order the divorced spouses are to be heard.

The hearing may be omitted if it is ~~not~~ infeasible.

(Para. 81.1.c.)

The spouse who has not the care of the person of the child, retains the right of personal intercourse with it.

The court of guardianship may control the intercourse as to particulars. The court of guardianship may also exclude any intercourse for a certain period or permanently if it is for particular reasons deemed useful to the welfare of the child.

As to the maintenance of children of divorced spouses.

If a divorced spouse has to provide maintenance to a mutual child, the other spouse is obliged to pay to him out of the income of his (her) property and from his or her earnings, an adequate contribution to the expenses of the maintenance, insofar as the same are not covered by the usufruct derived from the property of the child.

This claim is not assignable.

If the spouse who is liable to contribution has the care of the person of the child, he (she) may retain the contribution for his (her) own use towards the maintenance of the child.

Swiss Law on Divorce.

Swiss law admits the following grounds of divorce:

(a). Grounds of divorce based on guilt of either spouse.

(1) Adultery, (art. 137 of the Swiss Civil Code).

(2) Attempted murder, grave assaults, or serious insults.(art. 138, l.c.)

(3) If a spouse has committed a degrading crime or leads an immoral life, so that the other spouse cannot be expected to continue domestic community.(art.139,c.c.)

It is noteworthy that the commission of a degrading crime is sufficient, the conviction thereof is not requisite.

(4). Malicious desertion for at least two years.
(art. 140, c.c.).

(b) Grounds of divorce containing no guilt element.

(1) Insanity of either spouse if it is ~~so grave~~ gravity that the ~~sound~~ spouse cannot be expected to continue ~~the~~ domestic community and if the insanity is after ~~all~~ lapse of three years held by experts to be incurable. (art.141, ~~C.C.~~). C.C.
The statutory period begins at the date when the first appearance thereof was detected.

(2) Where ~~so grave a disorder~~ of the conjugal relations ~~has subsisted~~ that the spouses cannot be expected to continue domestic community. (art.142) ~~C.C.~~ C.C.

It may be caused by an incurable disease, venereal disease or the like. (Decision of the Federal Court 33,2,394).

Bars to divorce:

(1) Assent or condonation to adultery.

The right of the spouse to divorce is barred if he assents to, or condones the adultery complained of, (art. 137, l.c.)

(2) Condonation is a bar to the following grounds of divorce: Attempts to murder, grave assaults and insults. (art. 138, l.c.)

(3). Conduct conducing.

Where the grave disorder of the marital relation has been caused principally by the conduct of a spouse, his right to divorce is barred. (art. 142).

(4). Lapse of time.

The petition for divorce on one of the following grounds, such as adultery, attempts to murder, grave assaults and insults must be brought within six months from the time when the spouse is aware of facts constituting the grounds of divorce.

The petition for divorce is inadmissible if five years have elapsed since the ground of divorce has arisen.

A compensation of grounds of divorce is not recognised. In case where the petitioner is also guilty of a marital offence, the other spouse may institute a cross petition.

Conversion of judicial separation into a divorce.

Judicial separation may be granted upon the same grounds as those which justify divorce. (art. 143, l.c.) A judicial separation may be granted for a fixed or undetermined period; when the fixed period has expired or, if no period

has been fixed, when the judicial separation has been in force for three years, the judicial separation may be at the instance of either party converted into a decree of divorce, except the case where it is founded upon facts from which the party now petitioning for conversion

appears to be exclusively guilty. (art. 147 and 148 l.c.)

According to these articles it was decided in

Willnegger v. Willnegger (Sem. Jud. 1918,113) that

while divorce, which is not preceded by judicial separation, cannot be obtained by the spouse who is principally guilty of causing the rupture (art.142,II)

it can be obtained by him, after a decree of judicial separation has been pronounced, provided that he was not the ~~alone~~ guilty spouse.

But even in the latter case conversion into a decree of divorce is to be decreed if the other spouse refuses reunion. (art. 147 and 148).

Dissolution of marriage by reason of adjudication of the death of either spouse.

When the death of a person is most probable because he has disappeared having been in a great peril of life or when such a person has been absent for a long time without being heard of, he may be declared dead on ~~the~~ motion of those who derive rights from his death after at least a year has elapsed since that ~~peril~~ of life or after five years have elapsed since he has been heard of again. (art. 35, et seq.) The remaining spouse may bring an action for dissolution of the marriage based on the order declarative of the ~~pre~~sumed death of the other spouse.

Such a decree of dissolution of marriage is not a decree of divorce but a constitutive judicial declaration sui generis.

Effect of divorce.

Name. After the dissolution of the marriage the divorced woman is to take again the family name which she bore before the celebration of the marriage. If she was a widow at the date of the marriage she may be authorised by the divorce decree to resume her maiden name. (art. 149 of the Swiss Civil Code).

Damage and maintenance. If by divorce the property rights of the innocent spouse are prejudiced, the guilty spouse is to accord him or her an adequate compensation.

If the circumstances which have caused the divorce involve a grave injury to the reputation of the innocent spouse, the court may award him or her damages. (art. 151, l.c.)

If the innocent spouse is, by reason of the divorce, in great need, the other spouse, though he (she) be not the guilty party, may be made liable to contribute to his (her) maintenance an amount suitable to his (her) means. (art. 152, l.c.)

If according to the decree or a convention an allowance is payable as damages or maintenance, the obligation ceases by remarriage of the party entitled.

Custody and maintenance of children. The court decides in its discretion as to the exercise of parental control over children and their relation between parents and children, after having heard the parents and, if necessary, the Guardianship Board.

was not in fault
auch wenn er an der Scheidung nicht schuld ist e.g. incapacity art. 141

The divorced spouse from whom the children are withdrawn is liable to contribute according to his (her) means to the expenses of their maintenance and education; he or she retains the right of personal intercourse with the children according to the circumstances. The court has very wide discretionary powers; it may confide the children even to the guilty parents where the interests of the children demand it. See the decisions in Baillod v.

Baillod (Sem.Jud. 1913,754) ~~Anex~~ v. Anex (R.O.32.2.439).

Succession. A divorced spouse has no right whatever to inherit on the death of the other .(art.154, l.c.)

Comparison of the various grounds of divorce.

(1). First of all, it is noteworthy that, owing to the highly ethical character attributed to the conjugal union, a breach of marital duties as regards pecuniary interests per se does not constitute a ground of divorce under any of the laws concerned, although proprietary matters are often the principal cause of ^{the}disrupture of marital community.

Some of the remedies which are granted by the various courts against such breaches are discussed above. The marital duty of support^{ed} is not merely a pecuniary one, as above stated, but it flows from the conjugal legal duty of society and assistance and is, to be classed as of a mixed character; it has been called " a purely personal allowance"for the maintenance of the spouse"which and

is not assignable.

(2). The grounds of divorce are statutory ones with one exception, namely: in Scotland divorce on adultery is based on common law; the Scottish courts have granted divorce a vinculo matrimonii since the Reformation.(1560).

(3). As above explained, the grounds of divorce are to be classified first, on the question of guilt into grounds based upon the guilt of the other spouse and those containing no element of guilt ; and second, on the question of the discretionary power of the court into absolute (peremptory) grounds and relative (facultative) grounds of divorce.

Whereas formerly the laws on divorce were founded on the fault basis only, as is still the case in France, the most striking feature of the modern trend of the various legislatures is this that in cases where it is deemed to be in public interest, some grounds of divorce are admitted, which are not based on the guilt of the respondent. Insanity and declaration of presumed death are such grounds of dissolution of marriage, recognised by English, German and Swiss law.

(A) Since French law on divorce is founded solely on the fault basis of either spouse, insanity is no ground of divorce thereunder.

Dijon, Nov. 29, 1923, D 1924, 2, 46;

Poitiers, March 25, 1890, D 90, 2, 340.

Lyon, Nov. 20, 1903, D 1904, 2, 130, S. 1904, 2, 295.

Grounds of divorce containing no fault element are unknown to French law.

By German and Swiss law a further ground of divorce of the character just mentioned, is recognised, namely rupture of conjugal relations of such gravity that the spouses cannot be expected to live in common.

Finally, German law provides for three more grounds of such kind, namely: misconduct of the spouse caused by his or her mental disorder, not reaching the degree of insanity, further contagious or loathsome disease, and sterility.

not necessary
See p. 129 sub
140

The tests imposed by the laws of these countries of ascertaining insanity, as well as the rules concerning declaration of presumed death, differ greatly from each other.

(1). Insanity: As test of insanity amounting to a ground of divorce under English law is required the detention of the spouse of unsound mind in a mental institution for at least five years immediately preceding the presentation of the petition for divorce, while neither in Germany nor in Switzerland any such detention is required.

By German law no period for the continuance of the unsoundness of mind is fixed at all, whereas by Swiss law insanity amounts to a ground of divorce, if after a lapse of three years it is held by experts to be incurable.

Finally, it is to be observed that under German law mental derangement of a lesser degree than insanity is also recognised as ground of divorce. See p. 140.

(2) Declaration of presumption of death.

By English law sect.8 subs.1 of MCA 1938 no lapse of a definite period of absence is required and where, e.g. a spouse has been exposed to mortal danger, the court may make a decree of presumption of death and of dissolution of the marriage if it is satisfied that reasonable grounds exist to presume that the spouse who disappeared under such circumstances is dead; by subs.2 of sec.8 l.c. the fact that for a period of seven years or upwards a spouse has been continually absent from the other who has no reason to believe that his or her consort has been living within that time is deemed evidence that the spouse who has disappeared is dead until the contrary is proved. Under French law disappearance of a spouse is not recognised as a ground of dissolution of marriage. see p.130 By German law the dissolution of the marriage in case of absence is effected only by way of remarriage after judicial death declaration; as for the time limitations required for such declarations under German and Swiss law reference is made to page 144 and page 153 respectively.

(b) The grounds for divorce may also be classified into absolute (peremptory) and relative (facultative) grounds of divorce. If the fact constituting an absolute ground of divorce is established, the Court is bound to pronounce a decree of divorce. Relative grounds of divorce, on the other hand, are such as ^{where} even when the facts are established, ^{where} it is left to the discretion of the Court to grant a divorce or not. Under English Law adultery, incurable

Insanity and Desertion, on the part of either spouse, and rape, sodomy and bestiality, on the part of the husband, are absolute grounds of divorce while the others are relative. (facultative).

French Law provides two absolute grounds:-Adultery and conviction inflicting a degrading corporal punishment, and three relative (facultative) ones:

Threats or conduct dangerous to life or health of the other spouse, Extreme cruelty, and any serious breach of marital duty.

Under German Law there are two absolute grounds of divorce, namely adultery and persistent refusal to have issue, or use of contraceptives, while all others are relative grounds. But the absolute character of these grounds of divorce is substantially lessened by the statutory provision of para.56 of the German Law of 1938 by which it is in the discretion of the Court to determine whether the attitude of the injured spouse has been entirely indifferent towards the marital offence complained of. If so, then the court may refuse to grant divorce on those grounds.

It is noteworthy that by sec.2 (1) (a) of the English Matrimonial Causes Act , 1937, wilful refusal of marital intercourse by the respondent to consummate the marriage is a ground for a decree of nullity of marriage. I

The provisions concerning relative (facultative) grounds of divorce led to new grounds not expressly provided by law. Relative grounds permit the court to follow the modification caused by the evolution of the ideas and

concepts. Thus legal cruelty under English law has been defined by the courts as comprising the following grounds of divorce, expressly named as such by other laws:

Veneral disease; see Foster v. Foster (1921) (CA) p.438 ,

Intoxication, Powe v. Powe (1865) 4 S and T 489;

Criminal Conviction: Thompson v. Thompson (1901)
85 LT 172 and

Bosworthink v Bosworthink (1901) 86 LT 12.

German law has omitted two absolute (peremptory) grounds of divorce named by the German Civil Code in paras.1565 and 1566; (actions punishable according to paras. 171 and 175 of the German Penal Code) or if the spouse has designs on the life of the other, and it is left to the discretion of the court to treat such cases under the wide scope of the " relative ground" of par.49 of the law of 1938.

The French relative divorce ground of art. 231 C.C. namely, threats or conduct dangerous to the life or health of the other spouse, extreme cruelty, and ~~serious~~ ^{serious} breach of marital duty finds a very liberal interpretation by the Courts, so as to include :

Desertion, drunkenness, insulting words, and non-support (in connection with art. 212 C.C.); Refusal of sexual intercourse does not constitute a cause of divorce by article 231 unless it is not warranted. See decision Montpellier, Nov. 27, 1897, La Loi June 11, 1898; a husband has been granted a decree of divorce because of "absence of encouraging disposition of his young wife " See decision Toulouse January 30, 1896, La Loi, March 21, 1896.

Again, the Swiss courts interpret the relative ground of divorce provided by art. 142 of the Swiss Civil Code, (grave rupture of the common life) in giving it a very wide scope so as to ~~include~~² venereal disease, refusal of sexual intercourse, and ~~non-support~~. c/

Comparison of the various bars to divorce.

Discretionary bars to divorce, as recognised by English Law, see p.102, are unknown under Scottish Law, and under the Continental System^s of law. The laws concerned do not recognise compensatio criminis; the respondent may bring a cross action of divorce based upon the respective grounds. While delay constitutes, by English law, a discretionary bar, it is under German as well as under Swiss law provided that the action on certain grounds of divorce must be presented within a given period from the date when the fact constituting a cause for divorce has occurred, so that lapse of that time is an absolute bar to divorce.

The absolute bars of condonation and connivance are recognised in all the systems of law concerned. Divorce by mutual consent is not recognised by any of those laws and the courts refused to grant divorce where the parties seek to avoid that restriction by collusion. Under English law the provisions as to preventing collusion are so stringent that a divorce can hardly be obtained by way of collusive action of the spouses. Yet by the Continental systems of law parties to a marriage may, with regard to the liberal interpretation given to the conception of some of the grounds of divorce, sometimes be able to pro-

cure a divorce by collusive action.

Thus when both parties desire ~~divorce~~, they simulate facts which furnish the legal ground of divorce, concealing the true ground of mutual consent. The result has usually been arrived at in Germany and Switzerland by an action for divorce on the ground of desertion.

Again, in France art. 231 C.C. (serious breach of marital duty) has often been used for reaching the same result. As above stated it has been held sufficient to justify divorce where one spouse, without just cause has charged the other with adultery. (Art. 231, C.C.); hence this article 231 has often been employed in such case by spouses acting in agreement.

Fr/ On the rest, the provisions concerning discretionary bars under German law, are of a much larger scope than those under English law; by para. 54 as well as para. 55 the judge is to take into consideration whether the granting of divorce is morally justifiable i.e. whether it is in the public interest.

Comparison with regards to insanity as a bar to divorce.

Owing to the fact that under the new German law of 1938 every mental affection of the spouse, even if it does not reach the degree of insanity, may be a ground for divorce; insanity cannot be pleaded as a bar to divorce; for, if, the respondent pleads insanity, the petitioner can insist that insanity be made a ground for divorce. In Switzerland insanity can be pleaded insofar as the petition for divorce is based upon a ground which consists of an element of guilt. As to English law, see p. 106.

Chapter IX.

Conflict rules as to choice of law:

Anglo-American systems of law:

Since domicile is the sole test of jurisdiction in divorce, English law alone applies to such proceedings. By this law alone it is to be determined whether the facts alleged justify the divorce sought, irrespective of the place where the marriage was entered into, or of the place where the cause of divorce occurred, and irrespective of nationality of the spouses. *Bater v. Bater* (1906) P.269 (English case), and *Wilson v. Wilson* 10, Ind.436 (1858), *Rose v. Rose* 132, Minn.340; 156 NW 664 (1916) (American cases) .

Thus the parties to a marriage may by change of their domicile procure a divorce which they would have been unable to obtain in their previous domicile either because the law of the latter does not recognise divorce at all or does not admit the ground of divorce relied on.

Further, a husband may by changing his domicile subject his wife to the jurisdiction of the courts of a foreign country and bring her under a system of positive law that is less favourable to her.

For the methods of removing such hardship reference is made to p.239.

Mention may here be made only of the fact that some states of USA have attempted at preventing such "migratory"

divorces by applying the following methods:

(a) By embodying sect.22 of the Uniform Marriage Act, for details on this subject reference is made to p.255.

and (b) by requiring some definite period of residence with-in the state for granting a divorce. Some statutes require also a definite period of residence within the county (district) to give the particular court jurisdiction.

Continental systems of law. Hague Convention II on divorce.

There are two Hague Conventions of 1902; Convention I. treats of marriage and Convention II of divorce and separation.

Since France, Germany and Switzerland have been signatories to Convention II up to 1914, 1934, and 1929, respectively and Italy still adheres to this Convention, it seems necessary to state the significant features of that Convention II.

The rules laid down in that Convention are still binding upon the courts of the states which have renounced it in respect of those judgments of divorce which have been rendered by their courts before the renouncement of the Convention. *renunciation*

Further, the courts of those states take sometimes account of these rules and the Italian courts apply them or similar rules even to parties which are not members of Treaty powers to that Convention. The Convention II contains conflict rules (a) as to jurisdiction , (b) as to choice of law and (c) as to recognition of foreign judgments of divorce: *the*

(a) The jurisdiction as to divorce is regulated in art. 5.

According to this article, suits for divorce may be brought

(1) in the courts which are competent by the national law of the spouses; the national jurisdiction is reserved in so far as the national courts exercise exclusive jurisdiction in divorce.

(2) Where the national courts do not exercise exclusive jurisdiction, petitions for divorce may also be brought in the courts of the domicile of the spouses. If by their national law the spouses have not the same domicile, the courts of the respondent's domicile are competent.

(3) In case where the domicile has been abandoned or changed after the happening of the cause of divorce, the petition for divorce may be brought in the court of the last common domicile of the spouses.

Finally, the foreign courts remain competent as regards the dissolution of a marriage in respect of which petition for divorce cannot be brought in the competent national court; this rule applies to marriages which according to art. 3 (1), art. 5(2) and art. 6(2) of the Hague Convention I of 1902 on marriage, are deemed to be invalid by the national law and for this reason cannot be dissolved by the national courts. The last mentioned provisions of the Hague Convention I as to marriage concerning countries the law of which requires a religious celebration and which may refuse to recognise as valid marriages contracted by their nationals abroad without

observing that requirement. In the event of the spouses not having the same nationality the law last, common to them is according to art. 8 of the Convention II deemed to be their national law for the application of the rules stated above. *nationality*

(b). According to art. 1 and 2 of Convention II it is required that both the national law and the *lex fori* must recognise the institution of divorce, and that also the grounds of divorce must ~~subsit~~ *subsist* according to both systems of law; it suffices, however, that divorce is admissible on different grounds in each of them and it is simply demanded that one ground shall subsist by the national law and another by the *lex fori*. There are two exceptions to these rules of arts. 1 and 2, namely :

(a) According to art. 3 the national law alone shall be observed if the *lex fori* directs or permits that course. This exception was made at the request of Italy where at that time some courts granted divorces to foreigners although the institution of divorce is not recognised under Italian law. But the judicial opinion in Italy is now to the contrary, since the decision of the Court of Cassation of ~~Turino~~ *Torino* of November 1900, *Monitore* 1900, 981. *o/*

See page. 186.

(b) Further, according to art. 4 the national law of the spouses cannot be invoked to give the character of a cause of divorce to a fact that happened when the spouses or one of them had another nationality. It is intended by this rule that a change of nationality may not be made by one spouse to the prejudice of the other.

Finally, according to art. 8, there is in the event of the spouses not having the same nationality, the law last common to them deemed to be their national law for the application of the rules stated above.

Thus, if one of the spouses only changes nationality or if both change it, but each of them to another, a different nationality, such a change of nationality is immaterial as to the law to be applied to matters of divorce, since the former national law common to both remains applicable; yet in case where both change the nationality and acquire thereby the same nationality, the new national law common to both is applicable to questions of divorce subject to the limitation set forth in art. 4 of the Convention II. Therein no provisions are to be found concerning cases of diversity of nationality of spouses on marriage and of double nationality or of no nationality of spouses, since the consequences of the modern tendency towards equality of the sexes as regards acquisition of separate nationality by a married woman were not known then.

A married woman may now under the laws of the various states retain her original nationality on marriage or reacquire it when separated. The difficulties arising out of the application of the arts. 4 and 8 in connection with art. 1 and 2 led to the renunciation of the Convention II by Switzerland in 1929, by Sweden in 1933, and by Germany in 1934; the courts of these countries were by those articles precluded from granting divorces to their nationals when, for instance,

women who judicially separated from their husbands sought after regaining their original nationality to obtain a divorce or conversion of their judicial separation into divorce. There is no provision in the Convention, but seems to be clear from general principles that a change of nationality after the institution of the petition for divorce is immaterial as to questions discussed above. For details on this subject reference is made to the next page

(c) As to recognition of decrees of divorce.

By art. 7 a decree of divorce, if rendered by a court competent according to art. 5, is to be recognised everywhere within the purview of the Convention II. on condition that its clauses have been observed and that in case of a decree by default the service of the petition on the respondent has been effected in accordance with the particular provisions which the national law requires for the recognition of foreign judgments. Similarly the conditions of Arts. 1 and 2 of the Convention must have been complied with. A decree of divorce granted by administrative jurisdiction shall equally be recognised everywhere within the purview of the Convention II, if the national law of each of the parties recognises such divorce. By this rule the courts concerned are precluded from refusing recognition of divorce decrees in respect of their offending against public order, since, however, by arts. 1 and 2 of the Convention II, the national law as well as the ~~lex~~ ^{lex} fori are to be observed, that limitation is of less importance. It is noteworthy that

the national law controls both the question as to the domicile of the spouses and that as to the due services of the petition on the respondent in case of a decree by default (art. 7).

The purpose of this provision of art. 7 of the Convention II is to prevent a spouse from changing his domicile whereby the mode of due service might be altered to the prejudice of the other spouse.

Finally, there is no provision as to whether the courts concerned are bound to refuse recognition to decrees of divorce which have been granted without the rules prescribed by the Convention II being observed. The right answer to this question appears to be that from the omission of any provision in this respect it may be concluded that it is left to the discretion of the courts concerned to grant or refuse recognition of such decrees of divorce.

(d) The courts of Italy where the Convention II is still in force have extended the application of its rules to all decrees of divorce that are granted to foreigners by foreign courts, even if they do not belong to states which are signatories to the Convention II subject to some qualifications which will be discussed below.

French law .

Art. 3 of the French Civil Code declares French law to control status and capacity of French citizens, even though domiciled in a foreign country; hence even if the spouses live abroad and one of them is a French subject, proceedings for divorce may ~~be taken~~ before French courts and French law alone is to be applied there to, according to art. 14 and 15 of the French Civil Code; for the details reference is made to p.256.

As to foreigners nationality is the criterion of the choice of law in matters of divorce in France, with two exceptions,

- (1) where the application of the foreign law would be repugnant, to the public policy of French law and be
- (2) where the doctrine of renvoi is applicable.

As to (1): As under French law mutual consent is not recognised as ground for divorce, French courts decline to apply a foreign national law admitting that cause for divorce since it is offending against public policy. The same applies as regards insanity as ground for divorce, as French law on divorce is solely founded on the fault basis of either spouse.

Tr. Marseille February 21, 1902, Clunet 1904, p.188.

Another case falling within the scope of the principle of public policy is the conversion of a foreign judicial order of separation into a divorce decree where the former is based upon mutual consent.

The ground of divorce admitted by the foreign national law must be at least analogous to that of the French law in order to be recognised by the French courts, but

it is often a difficult to determine the question of characterization as to this matter.

The French courts also refuse to entertain a suit for divorce, if the national law of the foreigner refers divorce to religious law.

Paris, December 26, 1912, D.P.1914, 2- 47.

- (2) Renvoi : Where the national law of a foreigner domiciled in France is based upon the principle of domicile, French Courts accept the reference back to its law in matters of divorce and applies French law alone, especially as to the question whether the marital offence complained of constitutes a ground of divorce.

Seine February 11, 1913, Clunet 1913, 1233 in which case French internal law was applied to British subjects domiciled in France.

Lyon, July 24, 1898, Clunet 1899, pag. 569.

Paris, March 15, 1899, Clunet 1899, pag. 794.

Where by the national law now divorce is recognised French courts refuse to grant a decree of divorce.

Colmar, April 7, 1925, Clunet 1926, pag. 74 in which case spouses of Italian nationality were refused a decree of divorce since their national law prohibits divorce.

Change of nationality.

Where both spouses have changed to the same nationality the new national law controls the question whether or once what grounds divorce is admissible.

Cass.Civ. Clunet 33, 1093.

Where the change of nationality was effected fraudulently in order to avoid a law prohibiting divorce altogether or for certain causes and this is proved, the French courts disregard such change of nationality and apply the old law.

Narbonne, Dec. 21, 1898, Clunet 1899, p. 350.

Furthermore, where diversity of nationality of the spouses already has been existent on marriage, the capacity as to divorce is tested by the national law of each of the spouses concerned; this rule applies also to the case where one of the spouses is of French nationality.

Yet where change of nationality has been effected after the marriage, various views have been prevailing.

First of all, it must be noted, that as long as France adhered to the Hague Convention of 1902 on divorce, the French courts applied the rules of this Convention also to persons who did not belong to States which were signatories to the Convention.

For the details reference is made to p. 167.

Since France renounced the Hague Convention in 1914, the rules of the Convention were not applied any longer and some courts held that the national law of the husband is to be applied to such cases; thus the suit for divorce by a wife, formerly American, but restored to French citizenship by decree, was dismissed because under the law of the husband domiciled in New York the marital offence relied on, namely, drunkenness, was not admitted as a cause of divorce. Havre, Nov. 17, 1923, Clunet 1924, p. 1000.

Other decisions take the view that the law of the State to which the petitioner belongs is to be applied, particularly if it is French nationality to which the spouse petitioner reverted.

Tr. Tunis, Dec. 8, 1920, Clunet 1923, p. 110.

Seine, January 19, 1926. Clunet 1926, p. 663.

(Valentino case.)

Since intermarriages between French and Italian subjects are frequent, repatriations happen equally often to occur. In the well known case Ferrari Civ. July 6, 1922, Clunet 1922, 714, a French woman who by her marriage became an Italian citizen, after having procured a separation from bed and board in Italy, was repatriated and obtained thereafter a divorce from the French courts. The plea of fraud by the Italian husband was disregarded on the reasoning that the courts are not permitted to re-examine the validity of the administrative act of naturalisation. The decision was followed by Civ. May 7, 1928, D.H. 1928, 350. S 929.1.9; Civil February 5, 1929, Gazette Pal. 1929, 1, 426. Thus, the practice inaugurated by the decision in the Ferrari -case is a constant one now although some writers as Pillet and Niboyet still take the opposite view and regard such a divorce decree as a violation of the right acquired by the other spouse on marriage that the latter should remain indissoluble.

The facts constituting the ground of divorce may precede such change of nationality, provided that the legal consequences are still subsisting at the date of the

commencement of the suit.

2nd arrêt Ferrari ,Civ. March 14, 1928, D.28,253.

Clunet 1928, p.383.

Limoges, Febr. 26, 1929; Nîmes, April 13,1929,Clunet 1930,p.368.

Austrian law: By Austrian law domicile is test of personal status of Austrian citizens and nationality that of foreigners. Sec. 4 of the Austrian Civil Code reads as follows :

" Austrian citizens are bound by Austrian law as regards their legal acts or transactions entered into by them abroad insofar as their capacity of acting is restricted by law, and these legal transactions shall have some legal effect within the territory of Austria. "

This section has been interpreted by Burckhard to the effect that the Austrian law applies to legal transactions entered into by Austrian citizens abroad, in case only where such transactions are intended to have some legal effect within the territory of Austria; the Austrian Supreme Court has followed that view in its decision Slg. X Nr. 3649. The rule laid down in that decision is to the following effect:

The marriage of an Austrian citizen contracted abroad in spite of an Austrian statutory provision forbidding such marriages is deemed void within the territory of Austria only when at the date of the celebration of such marriage the intent of the parties to the marriage has been to the effect that the marriage should carry with it some legal effect within the territory of Austria. It is immaterial whether on contracting the marriage the parties thereto have acted with the purpose of evading

Austrian law or because of ignorance thereof. A marriage contracted abroad by an Austrian citizen domiciled in a foreign state, is deemed valid by Austrian courts in spite of the prohibitory provisions of an Austrian statute if he or she, only a f t e r the marriage, makes up his (her) mind to return to Austria and if the marriage is valid by the law of his or her foreign domicile. National law, on the other hand, is a test as regards the capacity of foreigners. The relative sec. 34 of the Austrian Civil Code runs:

" The capacity of foreigners as regards legal transactions is generally governed by the law of the place to which they with regard to their domicile or in case of having no domicile, by virtue of their birth belong as subjects. "

The meaning of this section is very obscure. The modern view is this, that the expressions " domicile and birth" used in it are the titles to acquisition of citizenship usual at that time, so that the main stress is to be laid upon the expression " subject."

Decision of the Supreme Court Slg. X Nr. 3984.

Thus the personal status of foreigners is governed by their national law with some qualifications, as, for instance, with regard to the principles of public policy and reciprocity.

This interpretation of the section corresponds to the authoritative construction given to it by the Imperial Council Order of Dec. 22, 1814, Collection of Civil Decisions Nr. 1118.

Previously the courts and the writers took the opposite

view as regards the interpretation of the statutory provision para. 4 and 34 of the Austrian Civil Code mentioned above.

~~These rules apply~~ to questions of legal capacity of contracting marriage but they do not apply to matters of divorce. A few statutory provisions only with regard to rules of conflict of laws are contained in the Austrian statutes, the main part of private international law has been built up by writers and decisions of the courts.

According to para. 100, of the jurisdiction rules and 81 (III) of the statute relating to ~~executory pro-~~ proceedings, dissolution of marriage of Austrian citizens is controlled by Austrian law exclusively. As stated above, ~~a marriage entered into abroad by an~~ Austrian citizen domiciled in a foreign country is valid in Austria under certain conditions; yet the law of the place of celebration of such marriage is entirely immaterial as regards the question of the dissolution of the marriage.

Decision of the Supreme Court of Dec. 7, 1909 ~~Glaser-Unger~~, Collection NF. No. 1. Slg. 14.006, VI. Nr. 2196, VIII. Nr. 2925, Finally, it may be observed that under Austrian law the judgment of divorce as well as that of annulment of marriage is expressly restricted as regards its operation to the territory of Austria; this peculiarity of the Austrian law is in contrast with the modern idea of private international law; this rule is one of the reasons supporting the interpretation of para. 4 of the Austrian Civil Code stated above.

As to the dissolution of marriages of foreigners.

By an Imperial Council Order of the Oct. 23, 1801, Collection of the Civil Statutes, Nr. 542, it was laid down that the law applicable to divorce of foreigners is the law of the place of celebration of marriage.

It is doubtful whether this statutory provision was repealed by the introduction of the Austrian Civil Code in 1811.

Lastly, by the decision of the Supreme Court of Dec. 28, 1910 Glaser Unger, NF. 5280, it was held to be still in force. Yet the better view on this subject is that taken by a series of decisions of the Austrian Supreme Court holding that the Austrian courts are required to apply Austrian law alone to dissolution of marriages.

Decisions of the Supreme Court of October 21, 1886, Glaser Unger NF. 1870, Dec. 28, 1910, Glaser Unger NF 5280, April 29, 1902, SZ III, Nr. 48, which latter was concerned with the dissolution of the marriage of citizens of the United States domiciled in Austria.

The Austrian law alone is to be applied to dissolution of marriage irrespective of whether or not the decree of divorce would be recognised by the national law of the spouses.

Decision of June 11, 1907, Glaser-Unger NF 3806.

German law. The choice of law rule as to matters of divorce is laid down by article 17 of the Introductory Act to the German Civil Code; the wording of this article is as follows:

" As to the dissolution of marriage, the laws of that state are applicable to which the husband belongs at the time of the commencement of the suit. A fact which occurred whilst the husband belonged to another state can be asserted as ground for divorce only, if the fact is also under the laws of this country a ground of divorce. If at the time of the commencement of this suit the German citizenship of the husband has been lost, but if the wife is German, the German laws shall apply. Divorce on the ground of a foreign law can be decreed in this country only if the divorce should be admissible as well under the foreign law as under German law."

The wording of this article is here given as modified by para. 29 of the decree concerning the matrimonial causes law of July 6, of 1938.

According to this art. German Courts may pronounce a decree of dissolution of the marriage of foreign spouses only, if it is admissible both by the national law of the husband and German law.

Under the national law of the husband is meant his national municipal law including its rules of conflict of laws; the renvoi (remission) by that national law to German law is deemed to be only a reference back to German internal law exclusive of conflict rules.

Imperial Court RG. 136 , 363; 782, 237.

For details reference is made to the heading "renvoi" see p. 33.

It is often difficult to decide whether or not the grounds of divorce conform in both laws. The German Courts

took a rather liberal view in this respect and hold it sufficient that the grounds of divorce should be of similar character only.

At any rate, in the case of combination of the principles of national law and that of the forum as laid down by the relative provision of art. 17 that law that is of the most stringent character will always prevail over the more liberal one as regards grounds of divorce.

The question often arose whether, if the foreign law recognises an institution of permanent judicial separation, unknown to German law, such separation might be granted by German Courts; the German Imperial Court refused to grant a decree of permanent separation on the reasoning that German law does not recognise that institution; see decision . Imperial Court 55,345.

The fact that formed a cause for divorce must by par2 of art. 17 German Civil Code not have lost its character of affording a divorce ground by certain intervening events, as condonation or lapse of time, but must still be operative at the date of change of nationality, so as to operate as ground of divorce.

Para. 3 of art. 17 is applicable only if the husband has acquired foreign citizenship; for if he has lost his German citizenship without acquiring another i.e. if he remains stateless, art. 29 which applies to stateless persons, is applicable, viz. German law applies. Art. 29 German Civil Code runs as follows:

" The rights of a stateless person are to be determined so far as the laws of the state to which a person belongs are declared as controlling according to the laws of the State where he has his habitual residence and if not his habitual residence, where he has his abode or had such at the time in question. "

Para. 3 of Art. 17 applies therefore only in the case where the husband acquires another citizenship while the wife retains her German citizenship; even if, under the new national law of her husband, the marriage were indissoluble, it would not bar the German wife's suit for divorce; on the other hand, German law applies in such case although it be less favourable to her than the new national law of her husband.

Attention may be drawn on this occasion to another provision as regards ~~divorce by a stateless person~~ ~~stateless person~~ person, namely, para. 32 of the statute of April 14, 1938 German Civil Code, I page 380:

" If the state according to whose law the rights of a stateless person are to be determined declares the marriage to be indissoluble in principle, and a suit brought by him has been dismissed for that reason, the statutory provisions on the conclusiveness of the dismissal of the suit do not bar his fresh suit for divorce."

German law also applies in case of the renvoi, regulated by art. 27, that is to say, in case where the national law of a foreign citizen refers the matter back to German law, either because it is the domiciliary law or for some other reason. See page. 33

Another exception to para 1 and 2 of art. 17 is the case falling within art. 30, viz. where the national law of the spouses concerned is deemed to be against good morals or

or against that purpose of a German law.

A further exception is art. 17 l.c. is made by art. 1 of the statute on the application of German law to matters of divorce of Jan. 24. 1936 Imperial Law Gazette I page 48 under which German law is applicable to the suit for divorce by a wife upon condition that the wife only, but not her husband be of German citizenship and the national law of her husband declares the marriage to be indissoluble in principle.

As above stated, under German rules of conflict of laws (art. 17 para. 1) the husband's national law controls matters of divorce; therefore, those conflicts which spring from the diversity of the nationalities of the spouses do not arise, except in the case of a suit for divorce by a German wife whose husband has become stateless.

Change of nationality after the institution of the suit for divorce is immaterial as to the jurisdiction assumed by the German Court in the matter ; but, as regards the substantive law to be applied to the case, the date of the last hearing in the divorce suit is decisive.

The new law at that date, if the nationality of the husband has been changed after the commencement of the proceedings for divorce, is to be applied with some qualifications discussed above on p. 179 The divorce grounds must be admissible at that date by both the national law and that of the forum.

Finally it may be observed that the provisions of art. 17 (1 and 3) are applicable as to the effects of divorce,

viz. thenational law of the husband at the time of the institution of the divorce proceedings continues to control those matters, (Imperial Court 38,198 and the resolution of the assembled Civil Senates of the Imperial Court , Imperial Court 41, 191; but these rules apply to general marital proprietary duties only; the special duties arising from marital regimes are controlled by their own conflict rules.

Conflict rules as to matters of declaration of presumed death:

The rules as to choice of law in matters of declaration of presumed death are stated in art. 9 of the Introductory Act to the German Civil Code.

(a) As to German citizens :

A German citizen who has disappeared may be adjudged dead by German courts according to German laws, if he was a German citizen at the time of his disappearance,

(b) as to foreigners:

A foreigner who has disappeared may by German courts be adjudged dead under German law with effect as to those legal relations which are governed by German laws as well as with the effect as to property situate in Germany.

Finally, a foreigner husband who has disappeared and had his last domicile before disappearance in Germany may be adjudged dead upon application of his wife under German law without the qualifications as to the effect mentioned above under (b) , if the wife who has remained in, or returned to, Germany, had been a German citizen

until the respective marriage.

The above mentioned jurisdiction of German courts is not exclusive, so that German courts would recognise an adjudication of presumed death of a German citizen rendered by foreign courts but subject to the same restrictions as apply to adjudications which are rendered in Germany over foreigners. They recognise also adjudications of presumed death of foreigners rendered by their national courts of the latter.

As regards foreigners domiciled in Switzerland, by Swiss law the question whether a divorce is admissible is governed by both national law and lex fori, while the question upon what grounds and under what circumstances divorce is obtainable is controlled by the lex fori, according to art. 61, § 1, of the Final Title to the C.C. Code.

In case of change of nationality Swiss law rules that the new national law controls divorce with the exception that a fact which has occurred at a time when the spouses have been under another national law, can be claimed as a ground of divorce only, if that fact were the cause of divorce, also at the time of change of nationality.

art. 61, § 1, II, of the Final Title to the C.C. Code.

This rule, however, does not apply to a change of nationality to a Swiss one; in such case the Swiss courts grant a divorce when there is a cause of divorce by Swiss law; the courts do not investigate the motif of the change of nationality; even if it has been effected for the sole purpose to procure a divorce thereby, it is

Swiss law:

Swiss law alone is applicable to dissolution of marriage of Swiss citizens domiciled in Switzerland; in case of their being domiciled abroad, Swiss Courts possess an optional jurisdiction in divorce according to art. 61, 7 g. of the Final Title to the Swiss Civil Code. Swiss citizens may in the latter case sue for divorce in Switzerland or before the court of their foreign domicile. In the former case Swiss law alone is applicable to the divorce.

As regards foreigners domiciled in Switzerland, by Swiss law the question whether a divorce is admissible is governed by both national law and lex fori, while the question upon what grounds and under what **circumstances** divorce is obtainable, is controlled by the lex fori, according to art. 61, 7 h of the Final Title to the Civil Code.

In case of change of nationality Swiss law rules that the new national law controls divorce with the exception that a fact which has occurred at a time when the spouses have been under another national law, can be claimed as a ground of divorce only, if that fact were the cause of divorce, also at the time of change of nationality.

(art. 61, 7 h II. of the Final Title to the C.C.)

This rule, however, does not apply to a change of nationality to a Swiss one; in such case the Swiss courts grant a divorce when there is a cause of divorce by Swiss law; the courts do not investigate the motif of the change of nationality; even if it ~~has been~~ effected for the sole purpose to procure a divorce thereby, it is

disregarded.

Federal Court's decision 40, 1, 427.

In case of diversity of nationalities of the spouses the national law of the petitioner applies to divorce; thus if the petitioner is of Swiss nationality, Swiss law is to be applied to the divorce case without any regard to the national law of the respondent.

Decisions of the Federal Court , June 13, 1907, 33, I, 355 in which case the court granted a divorce to a naturalised Swiss, former Austrian citizen, against his wife, being an Austrian citizen of Roman Catholic faith. Decision of the Federal Court, May 3, 1932, 58, II, 93 in which case a judgment of divorce was granted to a repatriated Swiss wife whose husband retained his Italian citizenship, although that judgment could be not recognised by the national law of the husband. Till 1929 the date of the renunciation of the Hague Convention 1902 by Switzerland, the Swiss court were required to apply the relative art. of this Convention. Thus Swiss Courts were bound by art 4 & 8 of that Convention dismissed a petition for divorce which was brought by a Swiss woman who married an Italian citizen in Switzerland and having been deserted by her husband procured a judicial separation and regained her Swiss citizenship. The reason for the dismissal was that ~~that~~ under her former national (Italian) law divorce was not admissible.

Decision of the Tribunal of Geneva of Jan. 27, 1922, Clunet 1922, pag. 456.

Italian law.

In Italy nationality is the test of choice of law as regards status.

Although by Italian law divorce from the bond of matrimony is not recognised, Italian courts have for some time granted divorce to foreigners who were entitled thereto by their national law.

App. Ancona, March 22, 1884, Monit. d.tr.1884, 367,

Tr. Genova June 7, 7. 1894, Monit.d.tr.1894,784.

Tr. Milano, Jun 2, 1897, Monit. d.tr.1897, 514.

Since the decision of Cass. Turin, Nov. 21,1900

Monit. 1900, 981, the courts take the opposite view and refuse to grant foreigners divorce a vinculo matrimonii.

Part III.

Procedure.

Chapter X.

1. Substance and procedure:

Procedural matters are the rules of the machinery destined by law to protect the civil rights of the parties by the tribunals.

Procedure as distinguished from substantive matters (the civil rights of the parties) are under the conflict rules governed by the law of the forum. This rule obtains in all systems of law.

The line between these two categories of matters is in some respects differently drawn by different systems. It is often difficult to classify the rules, for instance whether a certain rule of a foreign law is to be considered by English law as procedural or as substantive; if procedural, this part of the foreign law cannot be applied to the case in dispute before the court, since procedural matters are exclusively governed by English law; for instance both the Statute of Limitation and the rule concerning measures of damages are regarded by English law as procedural while continental systems of law consider them substantive for the choice of law purposes. That divergency between the English law and the Continental systems flows from the former hostile attitude of English Courts towards the recognition of foreign law which led to enlarging the concept of procedure and narrowing that of substance under English law.

This problem does not affect divorce proceedings in Anglo-American law systems, since domicile is the sole test, both of jurisdiction and choice of law as regards matters of divorce and therefore the *lex domicilii* i.e. the *lex fori* is to be applied to procedural matters as well as to substantive ones.

Yet we have to discuss the problem particularly insofar as it affects ancillary matters of divorce adjudicated on a foreign decree of divorce, which are sought to be enforced in England; in such proceedings may for instance the question arise as to whether an award of maintenance is enforceable with regard to the English or foreign Statute of Limitation or with regard to foreign limitation of actions.

By the decisions of *Huber v. Steiner* (1835) H.L. 2 Bing. N.C. 208 and *Donn v. Lippman* (1837) 5 Cl. and Fin. 1, H.L. Sc. A, it has been laid down, that for the purpose of the classification of rules of limitation of actions there is to be applied the test whether the rule extinguishes the right or merely bars the remedy; in the former case the rule of limitation is deemed to be substantive, in the latter to be procedural. Thus if that action, in the case supposed above, is barred by the English Statute of Limitation the right is not enforceable in England; if the English Statute of Limitation does not apply to the case, then the foreign rules as to limitation are to be classified by the rules of the foreign law, and having in that way found, that the rules of limitation of the foreign law are merely a bar to the action, then they are by English law regarded as procedural and cannot be applied,

if, on the other hand, by the foreign law the rule is considered to be extinguishing the right, it is then classified by the English rule of classification as substantive and operative in England.

Where the period of limitation differs in that it is shorter than the English period, the English Statute of Limitation applies.

Harries v. Quinni (1869) L.R. Q.B. 653.

There is an exception to the general rule that the rules of Limitation are procedural; in the case where the statute creating the right contains also the relative rule as to limitation.

The Continental Courts have often after examining into the nature of the rules declared rules contained in the Civil Codes to be of **procedurale** nature and, on the other hand, regarded rules stated in the Codes of Civil Procedure as being of substantive character.

Under German law rules concerning limitation of actions are regarded as of substantive nature and are therefore to be applied irrespective of the characterization applied to them by the foreign law.

Decision of the Imperial Court , RG. 145, 121.

Some continental writers take the view that the theory of the so- called "Rechtsschutzanspruch", see p 229.

may afford the criterion for the delimitation of procedure and substantive law respectively. The general definition that procedure is the system of norms which regulate the general and special suppositions for every judgment as opposed to those norms which determine the ever changing

content of the judgment does not afford any solution of this question. Since under the laws of some systems declaratory actions can be maintained where an actionable right does not exist or, at least, does not yet exist, and thus a remedy is given independently of the existence of a right, where an interest in such a judicial declaration is shown (Rechtsschutzinteresse) the system of procedure becomes dissociated from the possession of a right; this

"Rechtsschutzinteresse" can now afford the criterion for the delimitation of substance and procedure.

At any rate, the lines between these two branches of law (procedure and substance) are differently drawn in the different systems of law; hence there cannot be found an absolute logical basis for the solution of questions of delimitation.

Reasons of utility and convenience will greatly influence the decision on such questions, as Cook put it in his essay (1933), 42 Yale Law J. 333, 344:

"How far can the court of the forum go in applying the rule taken from the foreign system of law without unduly hindering or inconveniencing itself?".

2. Nature of the suit for divorce.

In general.

The nature of an action is to be classed by the cause underlying its prayer ; it may be a demand

(1) for some act or omission on the part of the defendant (action in personam) or

(2) for declaration of existence or non-existence of a right (action declaratory) or

(3) for change of an existing status or relation.

A judgment in an action in personam does not per se accomplish the object of the suit; it must be enforced by way of execution. For further details on this subject reference is made to the heading of enforcement of decrees concerning ancillary matters to, divorce, on p. 289.

A judgment in an action concerning status operates immediately and absolutely upon the status of the petitioner; no execution is necessary in order to enforce this judgment.

II. Declaratory judgment.

(a) English law.

Very often the necessity arises to procure declaratory judgment, ascertaining a right or legal relation. Its advantage lies, as Borchard puts it, " in enabling a plaintiff assailed by doubt and uncertainty arising from adverse claims or clouds, to avoid the resulting peril and insecurity by obtaining an authoritative adjudication of his rights, before risking disaster by acting on his own assumption or guess or incurring prejudice by not acting

because of fear of consequences!"(Borchard,Declaratory Judgment,1934,310).

as/ Insofar ⁿ an other remedy, for instance, coercive relief is available, the latter is to be preferred to a mere declaratory judgment.

Although a divorce decree declares the marriage to be dissolved, it is not a declaratory judgment; for a decree of divorce creates a status or a change of status by restoring the spouses to the state of unmarried persons whereas a declaratory judgment merely ascertains already existing rights or ~~existing~~ legal relations.

Again. an action of jactitstion of marriage is by English law an action in tort and though it has indirect declaratory effect as to the existence of the marriage, the judgment in such action is by the definition of the notion given above not a declaratory judgment. The declaratory judgment, previously authorised as a general procedural device in chancery cases, see the Chancery Procedure Act, 1852 (15 and 16 Victoria c.86) was extended to all actions and proceedings by the S.C.Rules 1883 which conferred upon the Court the power to make "binding declarations of right whether any consequential relief is or could be claimed or not.(RSCO XXV r.5).

The jurisdiction of the court under this rule is only limited by its own discretion, but the Divorce Division cannot give a declaratory judgment nor is this rule applicable to divorce proceedings, see decision of

De Gasquet James v. Duke of Mecklenburg-Schwerin (1914) P 53, except in the circumstances specified by the Legitimacy Act, 1926 and s. 188 of the Jud. Act, 1925. The Court may in this way also indirectly decide the question as to the validity of a decree of divorce being a preliminary question to the validity of a marriage, as for instance, in Armitage v. Attorney General (1906) P 35 and in Turner v. Thompson (1888).

Further examples of declaratory judgments rendered with regard to such specific issues are the decisions of Hope v. Hope (1854) 7 D, M&C and Guaranty Trusts v. Hamay (1915) 2 KB 536; in these cases the English courts made declarations of the English law on points that have arisen for decision by the foreign courts. A further illustration of an indirectly a declaratory judgment is Clark v. Clark (1921) TLR 815. It was an action for restitution of conjugal rights, where since the wife did not appear to the hearing the respondent husband was allowed to adduce evidence as to his domicile and to the law of his domicile with regard to the validity of the French decree of divorce and to have these facts embodied in the order dismissing his wife's petition for restitution of conjugal rights. If the device of declaratory judgment regarding the validity of foreign decrees of divorce, as mentioned in the preceding case, were generally available to the parties before contracting a second marriage, they would often refrain from contracting bigamous marriages; such a use of declaratory judgment in matters of divorce is the more important as

the danger often subsists of being charged with the felony of bigamy and as the illegitimacy of children of such marriages carries still with it heavy disadvantages.

The framers of the Matrimonial Causes Act., 1937, availed themselves of that modern device of declaratory judgment by introducing the decree of presumption of death of a spouse who has disappeared, which decree, however, is obtainable only in connection with a decree of divorce and inseparable therefrom.

For details on this subject may be referred to p.99.

Under Scottish law the declarator of marriage is such a declaratory judgment.

U.S.A. law on declaratory Judgment.

In USA. the Uniform declaratory Judgment Act., prepared by the National Conference of Commissioners of Uniform States Laws, has been adopted in a great number of jurisdictions; thereby a declaratory power of general application has been established.

In Bauman v. Bauman, 250 NY 382, 165 N.E. 819 (1929)

e/ the Court of the State of New York gave a declaratory judgment pronouncing a Mexican decree of divorce and a subsequent marriage void, but declined injunction relief. Yet the courts refuse declaratory relief where other forms of relief are ^aavailable.

Thus the same Court refused a declaratory judgment asked for by a plaintiff who had grounds for divorce.

German and Austrian law.

By para. 228 of the Austrian Code of Civil Procedure and

para. 256 of the German Code of Civil Procedure a party may bring an action for declaration of the existence or inexistence of a right or legal relation or of the authenticity or non- authenticity of a document, if he (she) can show his legal interest in having these questions determined as soon as possible. The courts may also by paras. 236,259 and 393 of the Austrian CCP and by paras. 280 and 506 of the German CCP render an inter - locutory declaratory judgment, on motion of either party to proceedings, determining the existence of some controverted right upon which the ultimate decision depends. When the requirements of para. 256 of German CCP. , cited above, are subsistent, an action declaratory of a foreign judgment's being in operation , is admissible. .

Decision of the Imperial Court RG 109,385.

Finally, according to para.638 of the German CCP. as amended by the Decree of July 27, 1938, Imperial Gazette, I.p.923 a declaratory judgment relating to status is declared to be binding upon all the world.

*Sydney -
Barch is ref
to 1935
we have not
got the last
of 1938*

III. Judgment in rem.

English law. A petition for divorce is a petition for a change of an existing status of marriage; it is treated in the decisions as an action in rem or quasi in rem and the decree of divorce being a decree on a question of that status is deemed to be a judgment in rem i.e.final and conclusive against all the world.

Lord Esher, then Brett LJ. said in Niboyet v.Niboyet , (1878) 4 PD 1:

" A judgment or decree determining what is the status of an individual is a judgment or decree in rem. It is therefore, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognised as binding in all suits and by all parties. Such a judgment where the jurisdiction of the court, which made it, is recognised, is treated as binding and final, not only by all courts of the country, but by the courts of all countries."

In *Salvesen otherwise Lorang v. Administrator of Austrian property*, (1927) AC 641, per Viscount Dunedin :

" A metaphysical idea, which is what the status is, is not strictly a res, but it, to borrow the phrase, savours of a res, and has all along been treated as such. Now the learned judges make distinction. They say that in an action of divorce you have to do with a res. to wit, the status of marriage, but that in action of nullity there is no status of marriage to be dealt with, and therefore no res. Now it seems to me that celibacy is just as much a status as marriage."

As will be shown below in chapter XIII. the provisions relating to recognition of foreign judgments of divorce are with regard to their nature, defined above, less stringent than those for other judgments.

German law. By German law any action concerning status is deemed binding against whole the world; this is expressly stated by the enactment para. 638 CCP as amended by Decree of July 27, 1938, cited above p. 195..

This view was also taken by the Imperial Court in its decisions RG. 59,20 and 80.323.

French law, by which marriage is regarded as civil contract, an action for divorce is deemed an action in personam. Some of the recent decisions, however, refused the theory of the contractual character of marriage in some respects and held that divorce is a status to be recognised everywhere.

Thus in the well-known case of Ferrari (Lyon, Dec. 17, 1925, J. Clunet 1926, 384) the contractual theory, by which the marriage would have been indissoluble, was not followed; it was held that "the agreement of the spouses at the time of the marriage does not control the latter's future characteristics, such as may result from changes in legislation or personal status." This decision was followed by the decisions of Civ. May 7, 1928 DH 1928, 350, S 1929, 1.9. c/

Civ. February 5, 1929, Gaz. Pal. 1929, I. 426.

(cited by Planiol et Ripert, vol. 14, p. 38).

As regards the question whether a declaration of exequatur is necessary for the recognition of foreign judgments, the French courts have for long distinguished between judgments relating to status and judgments in personam; thus foreign decrees of divorce are recognised, independently of any exequatur being obtained, save in case where an enforcement founded on such decree is sought.

Civ. Febr. 28, 1860, S 60, 1, 210. Seine, April 12, 1923, Clunet 1924, 107. concerning a German judgment of divorce (), and Req. March 3, 1930, S. 1930. I. 377.

Chapter XI.

1. Principles of Divorce Proceedings in general.

Civil procedure in general may be controlled either by the principle of accusation or by the principle of judicial investigation or by a combination of these principles. The principle of accusation is also called the principle of party presentation; a component of the latter is the principle of "dispositive election." The principle

of "dispositive election" is this - the parties are at liberty as to whether and for which of their substantive law rights they will bring an action or whether and which of their substantive law defences they will plead against an action. In order to achieve the intended judgment the parties when choosing the second alternatives may also be allowed by law to be free in assembling the cause material for this end, the judge is bound to consider the cause material only submitted to this examination by them. The principle of judicial investigation, on the other hand, also called the principle of officiality, is the opposite of the above described principle of party presentation.

By the principle of judicial investigation the parties are denied the right exclusively to determine what kind of cause material is to be put before the judge for examination; by this principle it is the duty of the judge to get the full cause material and to ascertain the absolute truth as far as humanly possible.

The judge may, therefore, by this principle consider facts and call witnesses on his own motion and disregard cause material laid before him by the parties even if they are agreed upon it, when he thinks it fit to do so.

The various civil procedures rest upon the one or the other of these principles of party presentation and judicial investigation or are based upon some sort of a combination of them. The rules regulating procedure in Divorce differ in many respects from those applied to

ordinary civil procedure. This divergency is due partly to the historical development of jurisdiction in matrimonial matters which was till 1857 exercised by the Ecclesiastical Courts partly to the great interest that the state has in the status of marriage and its incidents. English law.

The rules as to divorce proceedings were greatly influenced by the practice of the Ecclesiastical courts and the Canon Law respectively that they administered. From the latter law is derived the inquisitorial system which has maintained itself in divorce proceedings, whereas procedure in the other branches of law is mainly ruled by a sort of combination of this principle and the so-called " accusatorial" one.

The main features of the inquisitorial system are:

(1) The Court is required to investigate ex officio the material facts even when they are admitted by the parties. This duty of the court that has ever since been exercised by the court is now widened by section 4 of the Act, 1937. Even in undefended ~~causes~~ this duty of investigation obtains. This duty of investigation relates first of all, to the question of jurisdiction of the Court. Some earlier decisions have been to the contrary; thus in the case Zyklinski v. Zyklinski, 1862, 2 Sw. and Tr 420, it was held that the appearance of the husband without protest gave jurisdiction to an English Divorce Court, and in the case of Callwell v. Callwell (1863) 3 Sw and Tr 259, the Court exercised jurisdiction,

although the husband was not domiciled in England, this on the reasoning that the wife did not object to jurisdiction, but this rule of founding jurisdiction upon implied consent of the parties is not binding any more since the decision in *Le Mesurier v. Mesurier* and *Bater v. Bater*. This modern view is also laid down in *Armitage v. Attorney Gen.* (1906), p. 135.

In the case of *H.v.H.* (1928) p. 206 and *Horn v. Horn* (192), 142 LT. 93, it was held that even where the respondent were ~~estopped~~ stopped from setting up the plea of lack of jurisdiction by reason of the new domicile of the plaintiff, it was the duty of the Court to try the issue of domicile. This rule has been extended by the decision in *Herd v. Herd* (1936) page 205, to undefended causes; in a petition for divorce where the husband who had deserted his wife and had acquired a new domicile abroad failed to appear in his wife's petition and contest jurisdiction it was decided that it was the part of the Court to raise the question of domicile and jurisdiction respectively and having found that a new domicile has been established abroad by the respondent the court dismissed the petition for want of jurisdiction.

The same rule obtains now in Scotland; see decision *Brown v. Brown* (1928) S.C.542.

(2). In performing its duty of investigation, the Court is assisted by the King's Proctor according to sections 181 and 182 of the Judicature (Consolidation) Act, 1925.

R/ Formerly, the King's Proctor which office has been created by the King's Proctor Act, (1860), could only intervene after decree nisi on suspicion of collusion; see decision of Hudson v. Hudson (1875), 1 PD 65; but his function has been widened by the decision in Slogeth v. Slogeth (1928), p. 148, and the Matrimonial causes rule (1937); the King's Proctor has now the right to intervene also before decree nisi and to argue any important question and, of course, lastly, to intervene as at after decree nisi.

(3). For the same reason, viz: of public interest in the ~~adivorce~~ status rests Matrimonial causes rule 38; it provides that any person other than the King's proctor who desires to show cause against making absolute a decree nisi is allowed to do so by entering an appearance in the cause when the decree nisi has been pronounced, and by filing an affidavit within four days, setting forth the facts upon which he relies. Thus the woman named as an alleged adulteress may also after decree nisi has been pronounced intervene in accordance with this rule, unless she has intervened before in the suit, see decision W.v.W. (1936) p. 38. This intervention of the " third party" serves the end of assisting the Court in its duty of investigation into material facts.

a/ The principle of judicial investigation rules in the field of allegations as well as in that of evidence.

This principle operates as to allegations by way of amendments by which parties may be added to a suit or

struck out, or by amendments for the purpose of determining the question raised by or depending upon the proceedings. See RSC , order XVI, rule 110, and order XVIII, rule 12.

By the latter rule the judge may amend any defect or error in any proceedings. In the field of evidence there prevails the principle of party presentation. It is the task of the party to the petition to produce proof of their allegations. Although party presentation is the dominant principle in the field of proof, yet the principle of judicial investigation operates here too, either (a) in the affirmative or (b) in the negative direction:

- (a) In exceptional cases the judge will call a witness of his own motion or,
- (b) refuse evidence to a great extent either because he deems it inadmissible with regard to the so- called " best evidence rule " i.e. the rule forbidding substitutionary evidence where direct evidence is available, or because he thinks it irrelevant i.e. not logically probative. The relevancy of proof is to be determined by the rules of pleading and of substantive law. The refusal of evidence may also take place for some other legal reason, for instance, because the judge is bound by precedent; it seems important to mention in this connection the non-access rule in Russell v. Russell (1924) AC. 687. By this rule evidence of non- access cannot be given by either spouse tending to bastardise or legitimise a child conceived and born during wedlock ; the decisions

of Mart v. Mart (1926) P 24 and Stafford v.Kidd (1937) LKB 395 by which the view was taken that this rule did not apply to cases where the spouses were living apart under a deed of separation, have been overruled by the decision of Ettenfield v. Ettenfield (1940) CA. 96 in which the following rules are laid down :

(1) The rules that evidence cannot be given by any spouse tending to bastardise or legitimise the child conceived and born during wedlock is absolute, and applies not only when the parties are living together but when they are separated either by decree of a court of competent jurisdiction or by their own volition.

(2) Where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife, ~~The~~ husband need prove no more than the date of the decree ~~or~~ order of separation and the date of the birth of the child. If it must have been conceived after the date of the decree or order there is a presumptio juris that ~~it~~ is a bastard. She must rebut this presumption if she can, but she must do it by evidence other than her own.

(3) The presumption is that a child is legitimate; if the husband leads evidence to rebut that presumption, the husband must prove that fact by any means open to him other than his own evidence; the wife can call, but cannot herself give evidence of the child's legitimacy. Another important rule as to evidence in divorce proceedings is laid down by Section 198 of the Supreme Court Judicature (Consolidation) Act, 1925, as follows :

" No witness in proceedings involving questions of adultery shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she has already given evidence in the same proceedings and gives proof of alleged adultery."

Whereas the rules discussed above relate particularly to questions of adultery only, there has under English law developed a theory of estoppels, but not with regard to a particular sort of case, By these estoppels a party is precluded from denying the existence of some state or fact which he or she has formerly asserted by deed, by conduct, or by record; even if the assertion is entirely untrue, he or she is " estopped" from denying or from leading evidence to the contrary. It is treated as conclusive legal evidence against him(her).

For all the reasons given above the judge may, as stated by Matrimonial Causes Rule 25, refuse to admit evidence tendered in accordance with any order made under that rule, if in the interests of justice he should think fit to do so.

(4) Discovery and interrogatories are also founded on the inquisitorial principle.

A party, even before trial, may compel his (her) opponent by the equitable assistance of discovery and interrogatories to disclose evidential resources that are within his (her) knowledge (Matr. Cause Rule 23).

This legal device is unknown to continental laws.

(5) A further substantial principle of civil procedure in general is that of giving both parties to the proceedings the opportunity to be heard. The so- called principle

of Bilaterality. ~~How~~ ~~How far~~ violation of this principle constitutes a ground for non- recognition of foreign decrees, see p.280..

- (6) There is lastly, among the fundamental principles of modern civil procedure to be mentioned, that of publicity. The main lines of this principle are laid down in the decision of Scott v. Scott (1913) AC 417 where exceptions to it were specified. Vaughan Williams, Lord Justice, said at p. 260.

" I do feel that the hearing of trials in public is so precious a characteristic of English Law that it is important that the power to hear cases in camera, even by consent, should be limited by express specific limitation."

As the unfettered reporting of divorce cases was injurious to public morality some statutory limitations in this respect have been introduced."

For the relative limitations as to press reports concerning divorce proceedings reference is here made to the Regulation of Reports Act (1926) (16 and 17 Geo.5,C.61) and for the general limitations as to the principle of publicity to Section 189 A of the Supreme Court of Judicature Amendment Act. (1935).

While under English law witnesses are to be examined in open court, in France such evidence is taken on commission and written evidence prevails at the hearing before the court.

According to paras. 30 and 73 of the German Decree of July 27, 1938 Federal Gazette I.923 the public is excluded from the court in proceedings for divorce.

The continental systems take a middle course between the principle of party presentation and judicial investigation, called also principle of officiality. The former, as above stated, expresses the idea that the statute assigns to the party the function of assembling the cause material and limits the judge to the reception of such material. While the principle of party presentation prevails in proceedings concerning ordinary cases, the principle of judicial investigation is preponderant in proceedings for divorce. The judge is by this principle required ex officio to search for the absolute truth; he is not bound by the presentation of the parties even if they have agreed upon them, and may consider facts which the parties have not put before him. By paras. 37 and 77 of the German Decree of July 27, 1938, Imperial Law Gazette I p. 923 the court may of its own motion call witnesses and consider facts which the parties have not put before it, yet it can do so in spite of the protest of a party seeking divorce only in so far as it relates to facts serving the continuance of marriage. The public prosecutor, who according to para. 31 of this Decree has to assist the court in its duties as regards ascertaining of absolute truth possesses the same powers as those conferred upon the court by paras. 37 and 77. The judicial discretionary power of the French courts is rather unfettered since the procedural statutes lay down general principles only in this respect. The court may on its own motion order an inquiry into facts as it thinks fit. (art. 234 CCP).

In Switzerland where the cantons may make their own rules as to civil procedure there it is laid down by sec.113 of the Constitution Act that a judge is not to accept proof of any essential fact on which the claim for divorce is based, without being himself personally convinced that the fact took place as asserted, and further that the parties to such proceedings are not to give sworn evidence of any such essential fact.

(art. 158 of the Swiss Civil Code is to the same effect).

Reconciliation.

With regard to the interest which the State takes in the continuance of conjugal community particular provisions respecting reconciliation are embodied in the relative statutes.

English law. Under English law attempts at reconciliation are only prescribed in the exceptional case where a spouse makes an application by originating summons for leave to present a petition for divorce before three years have passed since the date of the marriage; by Matr.Cause Rule 2(2) it is ordained that in such a case attempts at reconciliation of the spouses are to be made before leave to file the petition is granted.

Again the very enactment of sec.1 of the MC.Act,1937 respecting the three years' waiting period as well as that of the MCA, 1860, relating to ~~decreecnisinain~~ aim principally at affording an opportunity of reconciliation. Under French law the party seeking divorce is required to make an application to the President of the Court civil for leave to file such suit for divorce ;

at the hearing on such application the judge is to make genuine attempts at reconciliation and to grant leave for filing the petition only if the attempts at reconciliation failed and he is convinced that reconciliation is improbable. (CCP 877). Similar provisions contain paras. 608 to 610 of the German Code of Civil Procedure as amended by para 32 of the Decree of July 27, 1938.

Imperial Gazette I, p. 623.

Where reconciliation seems probable, the petition for divorce is to be dismissed under Swiss law; on the other hand the petitioner has only to prove that he had made genuine attempts at reconciliation and they have failed. (art. 146 CC).

Decision of Bornio v. Bornio R.O. 40.2.7.

2. Special rules relating to procedure in divorce
under the various systems of law.

As to the capacity to bring and defend a suit for divorce.

English law: A minor or a person of unsound mind may by his next friend commence an action for divorce and may in case of being respondent defend it by a guardian appointed for that purpose. MC Rule 64.

Austrian law: By para.5 of the Decree of 1819 and para.4 of the Decree of the Minister of Justice of Dec.9, 1897 concerning procedure in matters of divorce and nullity of marriage a minor spouse may commence an action for divorce and defend it.

Decision of the Austrian Supreme Court Slg.VIII.3125.

According to para. 3 of the Austrian Code of Civil Proceed.

a foreigner who under his national law is incapable of bringing an action or defending it, may be regarded as having such capacity before Austrian Courts if he (she) is deemed to be capable in this respect by the relative provisions of the Austrian law.

German law: According to para.33 of the Decree of July 27, 1938, a spouse, even if he (she) be of limited capacity to effect a legal transaction, is capable of suing or being sued for divorce.

France: A minor is emancipated by marriage and the greater weight of judicial decisions regard a minor spouse as capable of suing and being sued for divorce. 5/

Paris, March 22, 1894, D 94.2472:

Angers, January 4, 1899, D. 99.2.160.

A feeble- minded person and a spendthrift may sue or be sued for divorce jointly with his judicial adviser.

Paris, March 25, 1890, D 90.2.257.

Swiss law: Art. 14 of the Swiss CC provides that marriage constitutes majority.

Death of the party to proceedings.

English law: On the death of a petitioner at any time before the decree absolute is made the suit abates.

Stanhope v. Stanhope (1886) 11 PD 103 CA.

Brocas v. Brocas (1861) 30 LJ. PM and A 172.

On the death of a respondent the cause also abates unless in a husband's petition damages are claimed.

M. v.M. and A (1910) 26, LTR 305.

There is no abatement on the death of a co-respondent.

German law. According to para. 628 Code of Civil Procedure in a case where one of the parties to the proceedings dies before the judgment has become final the suit for divorce abates and the cause may proceed only with regard to the costs to be awarded. Yet the filing of the suit has legal effect with regard to succession under will; for para. 2077 CC reads as follows:

" A testamentary disposition whereby a testator has made a testamentary gift to his spouse is inoperative, if the marriage is void, or if it has been dissolved before the death of the testator. The marriage is to be deemed dissolved, if the testator was entitled, at the time of his death, to petition for divorce by reason of the fault of the other spouse, and had filed a petition for divorce or judicial separation."

France: The rule that a suit for divorce abates in case of the death of a party to the proceedings applied till 1919 also to the case where a party died after the judgment had become final yet before its transcription. This rule was abolished by the law of June 16, 1919 under which the operation of the divorce judgment is no longer conditional upon its being transcribed upon the registers of civil status.

Trib. Seine, March 23, 1925, La Loi Oct. 2, 1925.

English law: In this connection mention may be made of some of the peculiarities of English law on procedure in matters of divorce:

(a) Co- respondent. By English law the husband petitioner is required to make the adulterer co- respondent, except when he is dispensed with naming anyone as a co-respondent by the judge. This rule does not apply to the adulteresse

who must be named only in the wife's petition, if her name is known. These rules are unknown to continental laws on procedure; there the suits for damages against adulterer or adulteresse may be heard only in ordinary proceedings,

(b) A further feature of English divorce procedure unknown to Continental laws is that divorce causes, especially petitions in which also damages against the co- respondent are claimed, are often tried by a judge with a common or special jury. MC Rule 29. Since, however, a petition for divorce is not a common law action and no statutory rule exists, ~~new, entitling a party to a jury~~ trial in divorce proceedings, there is no right to a jury and the court has full discretion in this matter.

Gunn v. Rugg, Gunn (1931) P. 147.

It may be observed, however, that by the Courts (Emergency Powers) Act 1939 the elimination of juries, save by special order, has been ordained for the duration of the present war.

(c) Affidavits. The petitioner is required to furnish along with the petition an affidavit in support and verifying the facts of which he (she) has personal cognisance and stating whether the ~~petition~~ is prosecuted in collusion with the respondent or any of the co- respondents. MC Rule 6. The respondent by MC Rule 23 is required if the answer contains counter- charges to file with the answer an affidavit verifying the answer especially also as to existence of collusion, connivance, and condonation.

The device of such sworn affidavits is also unknown to continental laws.

In this connection mention may also be made of the device of the Discretion Statement. (MC Rule 28). Every party to a matrimonial cause praying that the Court may exercise its discretion in his favour to grant a decree nisi notwithstanding that party's adultery, is required to lodge a statement, called the Discretionary Statement in the Divorce Registry. Such statement is open to the inspection of the King's Proctor but, except by the discretion of the Judge, it must not be inspected by anyone else.

The lodging of a Discretionary Statement is a prerequisite for the exercise of the courts discretion in suits for the exercise of the court's discretion in such cases.

(d) Cross- petition: A respondent who makes counter-charges may ask in his (her) answer for such relief as he (she) were entitled on filing a petition. But when the original petition is not a petition for divorce, but an action for judicial separation .restitution of conjugal rights or of nullity a cross-petition based on the counter- charges must be filed in order to get the relief (divorce) the reason being that the last mentioned petitions are not purely statutory ones, but still partly founded on ecclesiastical rules.

According to art. 239 of the French CC a counter-claim for divorce may be made in an answer to a suit for divorce, but not in an answer to a suit for separation.

According to para. 615 of the German Code of Civil Procedure a cross-bill for divorce may be amalgamated with a suit for divorce as well as with a suit for nullity of marriage or for restitution of conjugal rights.

Judgments:

English law: Where the petitioner does not prosecute the petition in the manner prescribed by law the respondent or any other party who has filed an answer such as the co-respondent or the named person intervening, may apply for dismissal of the petition. Where the respondent is seeking relief by his answer he may also proceed on his answer.

Volkers v. Volkers (1935) P 33.

It must be noticed that ~~causes~~ in which the court is asked to exercise its discretion, see p.102. or in which insanity is the ground relied on for relief, are treated as defended ~~causes~~, even when the respondent does not enter an appearance or not file any answer or in which all the answers filed have been struck out.

How far the court even in undefended causes is bound *ex officio* to inquire into material facts, has been dealt with above.

By English law the final decree of divorce is preceded by a preliminary decree, called decree nisi. Prior to 1860 the decree of divorce became final after it has been pronounced. By Matr. Causes Act. 1860 the institution of a decree nisi was introduced, which could be made absolute after three months unless the King's Proctor

or any third person intervened and showed cause why it should be rescinded; the period was extended by MC.Act 1866 to six months.

Both parties may now apply for the decree to be made absolute; for according to sec. 9 of the MCA 1937 were no such application has been made by the party who obtained the decree nisi, then, at any time, after expiration of the three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi has been granted, may apply to the court to make the decree absolute; The party may also in case of unreasonable delay ask for rescission of the decree nisi.

Rutter v. Rutter (1921) P. 421.

Hunter v. Hunter (1934) . P.92.

In a single case in which both parties asked the court to exercise its discretion in their favour, a decree of divorce was granted to both parties.

Abbis v. Abbis & Low, July 27, Times.

French Law: According to 394 CCP. where the petitioner does not prosecute the petition over three years the petition may be dismissed on motion of the respondent. There is no restriction upon taking a default judgment in divorce proceedings; the same rules apply in this respect as in ordinary proceedings.

Divorce may be pronounced against both parties to the proceedings.

Seine, Nov. 16, 1897, La Loi Dec. 31, 1897.

German law: Neither judgments on admissions nor judgments in default are admitted in proceedings for divorce under German law. para. 617 and 618 CCP.

Admissions of facts which are relied on in order to obtain a divorce are equally inadmissible. In case of default the hearing of the cause takes place in the same way as if the respondent had denied the petitioner's allegations, the court is bound to inquire into all material facts. W. 16.259. A judgment of divorce may be pronounced against both parties to the proceedings. The court may compel a party, even when defaulting to appear before the court in order to be examined as witness and in case of disobedience the same compulsory measures may be taken against him (her), as are provided in case of disobedience of a witness to an order of the court, except imprisonment. (para. 619 CCP. as amended by the decree of July 27, 1938) .

Under Austrian law such defaulting party may also be compelled by imprisonment to appear as witness.

(para. 12 of the Ministerial Decree of Dec.9, 1897, Imperial Gazette 283).

These rules do not apply to a case in which service by publication has been ordered.

According to para. 614 (a) CCP as, introduced by para. 34 of the Decree of July 27, 1938 Imperial Gazette 923, the suit for divorce may be abandoned until the judgment becomes final; in case of abandonment of the suit a judgment is deemed rescinded.

Appeal. In such case bring a fresh appeal.

English law : An appeal from decree nisi or absolute to the Court of Appeal is to be filed within six weeks of the decree, subject to the right of the trial judge or the Court of Appeal to extend the time.

Judicature Act. 1925, sec. 27, RSC 58, rule 15.

But such an appeal from a decree absolute does not lie in favour of any party, who having had time and opportunity to appeal, has not appealed from that decree. Judicature Act. 1925, sec. 30 (1) (c).

A motion for new trial i.e. in a case tried by a jury must be made in the first instance to the Court of Appeal (Judicature Act. 125, sec. 30 (1).

A motion for rehearing of a case heard by a judge alone where no error of the court at the hearing is alleged, must be made in the first instance to a Divisional Court of the Divorce Division. Matr. Caus. Rule 36(1).

French Law: Appeal may be entered within two months from the date when the judgment has been served on the losing party.

After the Court of Appeal has adjudicated, a judgment can be referred to the Supreme Court (Cour de Cassation) on specified grounds, as error in law or lack of jurisdiction (called review). The means of opposition is allowed against judgment by default, according to art. 247, and 158 CCP.

A judgment in default for non - appearance is according to art. 156 CCP deemed not rendered unless it is executed within six months of its service upon the defaulting party

who may in such case bring a fresh action. s/

Seine, February 1, 1894, Gazette de Tribunaux, Febr. 9, 1894.

It is inadmissible to release the right to appeal, according to art. 294, CC.

Cass. March 25, 1879, D. 1879, 1 270.

New Trial. Art. 480 CCP. allows a judgment to be annulled by the court which pronounced it on specified grounds, such as fraud, forgery; the facts to be grounds for such proceeding (requête civile) must not be such as could have been raised by appeal or review.

German law: An appeal against a judgment may be made within one month after its official issue, to the court of second instance and thence to the Imperial Court.

By the Decree of June 14, 1932, Imperial Law Gazette 1, p. 285

the judgment can be referred to the Imperial Court by way of a review (called "Revision") only by leave of the court of appeal. (Oberlandesgericht). The court of appeal may grant a leave to review if it departs from a decision of the Imperial court or if a question on a point of law of fundamental importance is expected to be clarified in this way. By German law it is allowed to waive the expiration of the time to appeal; in such case the judgment becomes final at the date when such declaration of waiver has been served upon the opposing

party. It is also to be mentioned that under German law there exists (1) an opposition called declaration of opposure ("Einspruch") which is allowed against a judgment in default. (2) an application for procedural

reinstatement and (3) a complaint of error allowed against certain judicial orders.

Extraordinary recourses serving for attack upon judgments in the court of rendition are:

(1) The complaint of nullity for specified grounds such as when the court has not been ordinarily constituted, or want of attorney (para. 579 CCP) and (2) the application for reopening of proceedings on a limited set of grounds, such as where a judgment of a criminal or administrative court which has been the basis for the judicial decision, has been quashed and replaced by a final judgment, or fresh evidence under certain conditions.

The statutory period of five years, beginning from the date when the judgment has become finally, is allowed for these extraordinary recourses, except the case of want of authority.

According to para. 614 (a) CCP as, introduced by para. 34 of the Decree of July 27, 1937, Imperial Gazette 1923. the suit for divorce may be abandoned, until the judgment becomes final; in case of abandonment of the suit a judgment is deemed rescinded.

Part IV.

Chapter XII.

Theories as to the Foundation of Recognition and Enforcement of Foreign Judgments.

English law:

There are various theories regarding the foundation of recognition and enforcement of foreign judgments.

A(1). Non- merger theory. Under English domestic law, by the theory of the quasi- contract of litis- contestation (or contract of record) the cause of action is deemed to have merged into the judgment so that the petitioner after recovering it is precluded from suing again, the same respondent on that original cause.

See Duchess Kingston's case 11 Sm.L.C.11th Ed.p.731
King v. Hoare (1844) M & W 494, 504.

This rule does, however, not apply to foreign judgments and thus the petitioner by reason of the so-called non- merger theory may sue on the original cause of action as well as on the judgment obtained abroad; the petitioner will choose the first alternative when he failed to establish his claim in the whole or in part.

Smith v. Nicolls 8 LU CP 92, Hall v. Odber 11, East 118 ,
Bank of Australasia v. Harding (1850) 9 CB 661,
Bank of Australasia v. Nias (1851) 16 QB 717.

In both cases mentioned above (action on the original cause of action or action on the foreign judgment) the foreign judgment produced before the Court was previously deemed to be merely " prima facie evidence " and the merits could be put in issue again and re- tried.

See Piggott
Foreign
Judgments

229
287
French law
stated here
has been
abrogated
by Law 15-dec
1904

Houlditch v. Donegall 2 Cl and F 470,
Ricardo v. Garcias 12 Cl. and F 368,
Walker v. Witter 1, Dougl 1;
Sinclair v. Fraser 1 Douglas 5.

It was not until the decision of Godard v. Gray LR QB 139, see also point (3) that the rule was laid down that a foreign judgment is as conclusive as a domestic one and, therefore, not reviewable or impeachable except on special grounds as, for instance, for want of jurisdiction, for fraud or for infringement of the principle of public policy or of natural justice, see p. 278.

According to the English case Pemberton v. Hughes (1899) 1 Ch. 781, 790 (AC) no challenge to res judicata is possible even where irregularities of procedure have occurred, if, the court is a competent court acting within its jurisdiction and no substantial injustice according to English ideas has been done; as long as the judgment is not reversed by that foreign court which pronounced it, it is regarded as valid by English Courts. The view that a foreign judgment was merely "prima facie evidence" was the main basis of the non-merger theory; although this view was abandoned and replaced by the well settled rules on recognition of foreign judgment (see (3) post, the non-merger theory as regards foreign judgments still prevails under English law, Barber v. Lamb 8 CB (NS) 95. Yet this theory is less important now, since in ^{the} case only when a party who has obtained a judgment rendered abroad in his favour, chooses to sue again in an English court on the original cause, ^{then} this theory prevents the defendant from pleading res judicata and thus results in allowing him to become

~~the defendant~~ liable for the costs of the new proceedings, unless that foreign judgment has been satisfied prior to those proceedings.

(2) Theory of comity: It has been held that the principle of comity was the foundation of recognition and enforcement of foreign judgments and that each country may regulate the terms of that comity; thus it was also held permissible to examine into the merits of the foreign judgment.

This theory was expounded in *Castrique v. Imrie*
LR 4 HL 414.

In U.S.A. this theory still rules the recognition of judgments pronounced by courts of foreign countries.

See judgment of the Supreme Court of U.S.A. in *Hulton v. Guyot* (1895) 159 U.S. 113, at 163 per Gray J. :

" No law has any effect of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, is put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations '.

" Comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation having due regard both to international duty and convenience and to the rights of its own citizens, or the persons who are under the protection of its own ".

For detailed discussion, especially with regard to judgments rendered by a court of a state of the Union reference is made to p. 228, 254 post.

(3) Theory of legal obligation, called also the theory of vested right
The theory of comity was because of its vague character
abandoned and replaced by the more fitting theory of
legal obligation. It has repeatedly been laid down in
the decisions that ~~as~~ the basis of enforcement of foreign
judgments where a competent Court has adjudicated a cer-
tain sum to be due, is a legal obligation arising from
this judgment, to pay that sum and that legal obligation
may be enforced by an English Court when called upon to
do so.

See Russell v. Smyth 9 M and W 810,
Williams v. Jones 14, LJE 414,
Godard v. Gray LR 6 QB 139,
Schibsby v. Westenholz LR 6 QB 155,
Harris v. Taylor (1915) 2 KB 580.

As stated above, the rules governing the incidents of
marriage including divorce are different in the different
countries; this flows from the character of marriage as
an institution in which the state takes a great interest.
By the view based on the status theory the answer to the
question whether a marriage may be dissolved at all or
under what circumstances or conditions it may be dissolved,
varies according to the domicile of the spouses for the time
being; this applies also in case of change of domicile.
the existence of the status, that is to say, the marriage
itself or the change of the status effectuated by a decree
of divorce, on the other hand, constitute vested
rights. of the individuals concerned which as a rule remain unaffected
by change of domicile .

Foreign judgments pleaded in defence. (exceptio rei
judicatae).

(B) A foreign judgment may also be pleaded in defence either because it is a decree of dismissal or it has already been put into execution and satisfied.

The Courts always held that there is a distinction between being called upon to enforce a foreign judgment and sustaining it in defence; in the latter case they declared it to be non-examinable upon the merits except for specified defects. Thus foreign and domestic judgments are on the same footing in regard to the plea of res judicata.

See Ricardo v. Garcias 12 Cl and F. 368 ,
Schibsby v. Westenholz LR 6 QB 155,
Barber v. Lamb 29, LJ CP 234.

The reason for this distinction given in Phillips v. Hunter
H. R. 2 H.L. 402 by Eyre C.J. is that in the case of applying
for enforcing a foreign judgment ~~it~~ is thereby voluntarily
submitted to the jurisdiction of the English Courts and
treated not as obligatory to the full extent as domestic
judgments; at any rate, the judgment must be properly
pleaded by way of estoppel. A similar distinction between
action and plea is to be found in the common law rules
concerning estoppels; estoppel is a rule whereby a party
is precluded from denying the existence of some state of
facts which he or she has formerly asserted (1) by deed,
or (2) by conduct, or (3) by way of the quasi contract
of litis contestation; the latter is called " estoppel
by record" and the finding of the Court on certain facts

the matter

that have been in issue must be accepted as truth by the parties to the judgment. There is a Common Law rule that a defence only, but not an action, can be founded on estoppels by deed or conduct; Low v. Bouverie (1891) Ch 82 at 105 per Bowen L.J. " Estoppel is only a rule of evidence. You cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said."

Exceptional Treatment of Divorce Decrees.

C (1). From the rules based on the theories discussed under points A (1) and (2) the Courts admitted, even before the theory of legal obligation had developed, certain exceptions, namely, judgments in cases of peculiar jurisdiction, such as concerning questions of status; such judgments were deemed to be not reviewable upon the merits, subject, of course, to some specified pleas. The reason given for the exceptional treatment is the expediency of having such questions settled once and for all in the Courts in which the parties were at first amenable. See Harvey v. Farnie (1882) (CA) 6PD 35 (HL) 8AC 43.

Bater v. Bater (1906) P 209.

Pemberton v. Hughes (1899) 1 CH 788.

(2) That exceptional treatment of judgments concerning status (decrees of divorce) is also to be found in the Scottish decisions Southgate v. Montgomerie (1837) 15 S 507, 519 and Boe v. Anderson (1857) 20 D 11 where

the Court held that there is a sound principle in the distinction between being called upon to enforce a foreign judgment, and sustaining it in defence as exceptio rei judicatae and that in the former case the judgment is examinable but not in the latter; Lord Medwyn after reviewing the authorities on this principle continued then at page 519;

" Certain exceptions are admitted, but still, I think, they do not trench upon the general rule... judgment in cases of peculiar jurisdiction, such as questions of status, the reason, being to be found in the admitted expediency of having such questions settled once and for ever in the courts to which the parties were at first amenable and also in the obedience which in former times was given to the ecclesiastical courts throughout Christendom in matters within their jurisdiction".

Conclusiveness of Judgment as to Jurisdictional Facts.

(A). (1). English law : The rule as to conclusiveness relative to the merits of a case applies to the findings as to jurisdictional facts only when the latter have been an issue before the Court.

See De Mora v. Concha (1885) 28, Ch. 268, 276.

In this case the question of domicile has been a non-essential issue and the Court of Appeal declined to accept the suggested proposition that a judgment in rem decides conclusively against all the world, not merely the titles, rights, or disposition of property which it necessarily determines, but also the questions of fact upon which such adjudication proceeded; but held that in the case of probate the adjudication as to domicile could only conclude the parties to the suit and their privies, and even this

only because there has been an express though unusual finding as to domicile which has probably been given at the special request of the parties.

In re Trufort, Trafford v. Blanc (1887) 36 ChD 600 where the finding of a Swiss Court as to jurisdiction were contested by plaintiff, the Court after reviewing the authorities as to conclusiveness of foreign judgments especially Castrique v. Imrie LR 4 HL 414 and Godard v. Gray LR 6 QB 139 relied upon De Cosse Brissac v. Bathbone 6 H and N 301 as to the question whether the conclusiveness of a foreign judgment was affected by discovery of fresh evidence; Stirling J at p.617 said

" consequently this is a decision that a foreign judgment binds, notwithstanding the discovery of fresh evidence and although the whole of the facts were not before the foreign tribunal at the time it delivered its decision... Every system of jurisprudence provides a mode by which a judgment may be reviewed and a cause reheard on the discovery of fresh evidence; and to the regular mode so provided recourse ought to be had, as in fact has been unsuccessfully done by the defendant in the present case".

The same view has been taken as regards the conclusiveness of findings on jurisdictional facts in Bater v. Bater (1906) P 209 per

7/ " It is submitted that this subsequent inquiry as to whether the foreign court's own rule of jurisdiction has been complied with, is contrary to the fundamental principle on which the law of foreign judgments is based. The English Courts never go into the question whether the foreign court has correctly interpreted. "

Dicey, 418

It may be observed that the question of domicile involved in that case is at least a mixed question of law and fact and the conclusion cited above is material to the subject here discussed.

By the Indian and Colonial Divorce Jurisdiction Act 1926 (16 and 17 Geo 5 c. 40) it was provided that the decrees of Divorce are to be recognised by the English High Court or the Scottish Court of Session and their registration is to be allowed if:

- (1) The Indian Court had jurisdiction according to the Act of 1926, as stated on p.241 ,
- (2) the Court administered the principles followed from time to time by the High Court in England,
- (3) the decree of divorce has been granted on a ground recognised by English law.

By this ^{it} Act is also provided that the findings of the Indian Court as to " domicile " ^{and} is binding on all the Courts of the three countries concerned, i.e. England, Scotland and India.

This is the only statutory provision concerning recognition of findings as to jurisdictional facts.

U.S.A. law :

The requirements for recognition of foreign judgments are laid down in 429 - 430 of the Restatement of Conflict of laws according to the usual practice of the Courts of U.S.A.

For a further discussion on this subject it may be referred to p.251

In accordance with the decision in Thomson v. Wightman (18 Wall 457 U.S. 1873), the restatement adopted the view that even though there is jurisdiction in the international sense, yet where an intrastate limitation of the jurisdiction of the court has been violated,

a judgment may be be collaterally attacked in another state as not being within the competency of the court. In earlier decisions it has been held that questions as to jurisdiction were re- examinable on the reasoning that a court could not confer upon itself the requisite power to decide a case by a mere finding that it had the jurisdiction. The doctrine of res judicata applied only to non- jurisdictional issues of law in cases where the court had jurisdiction over the parties.

In later decisions with regard to the full faith and credit clause and with regard to the due process clause, the fourteenth amendment of the Constitution, it was held that foreign judgments were to be recognised not because of the doctrine of comity but with regard to those constitutional provisions just mentioned which demand the recognition of judgments by a sister state; in these later decisions the courts took ~~the view to the effect~~ that records reciting jurisdiction must be given full faith and credit ; other decisions, however, are still to the contrary on the theory that in ~~case~~ where there is involved an ex parte finding the record was not conclusive. Some courts took the view that if litigated the other spouse was even by lack of jurisdiction estopped in any private matter from thereafter disputing the validity of the decree of divorce but not in a matter involving the question of ~~status~~ ~~status~~.

Gibbs v. Gibbs 26 Utah 382, 73 P 641 (1903). But this doctrine was abandoned in the case of Gould v. Gould 235 NY 14, 138 NE 490 (1923).

Finally, in Davis v. Davis 59 Supreme Court 3 (Nov.7,1938) it was held that since upon special appearance the issue of "domicil" of the petitioner has been litigated, the decree, based on the finding of domicil, is entitled to full faith and credit.

This This idea of conclusiveness as to jurisdictional facts was brought to its logical conclusion in the case of Stall v. Gottlieb (305 US 165,1938) in which it was laid down that litigation resolved a jurisdictional question conclusively, on the reasoning that a party is entitled to but one trial and that at that proceeding he or she should have the burden of presenting his entire case.

*Look at
Shelford
Law of Jurisdiction
Twice, 1841*

German law:

By the decision of the Imperial Court RG 75.147 it was laid down that the findings of the foreign court as to the facts constituting jurisdiction were not reviewable even in case of a judgment in default.

Finality and Conclusiveness of judgment.

In general.

(a) The claim against the state to have one's private right protected by the courts in case where it is threatened, disturbed, or not satisfied, has been termed by the German writer Wach " Rechtsschutzanspruch" as distinct from that private right itself. The most important requirement of recognition and enforcement of judgments is their finality and conclusiveness. There is to be distinguished between conclusiveness of judgment (German term " materielle Rechtskraft ") and procedural finality (German term " Formelle Rechtskraft "); the former is a notion of substantive law, the latter one of procedure.

By conclusiveness is meant that the findings of the court as to the " Rechtsschutzanspruch" involved are not controvertible, binding and authoritative; all these characteristics are attached to a conclusive judgment even if the judgment is wrong by error in law or in fact. The adjudication upon a matter by a final judgment engenders a legal title not by reason of its being lawful but only by virtue of the authoritative power inherent in that judgment and attached to it by law. On the foundation of that principle there is a great divergence of opinions among the writers on this subject; the judgment has been said to be binding because

- 9
- (1) it is lawful (Savigny, Unger)
 - (2) it is analogous to law (Bülow)
 - (3) it saves the courts from the trouble of re- opening disputes already adjudicated upon (J.Chr.Schwartz, Hellwig),
 - (4) it conforms to the duty of the state of preserving peace and order (Paulus,Binder),
 - (5) it is in the interest of the state in the legal security that there should be an end of litigation and the private legal relations should once and for all be secured.
(Bernatzik, Klein, Loeffler,Pollak).

See

See para. 322 of the German Code of Civil Procedure concerning the "Materielle Rechtskraft " . The courts on their own motion are bound to enquire as to whether there has already been rendered a final judgment on the same subject- matter between the same parties and to refuse to adjudicate upon that matter again.

Under English law the fundamental doctrine of res judicata (conclusiveness of judgment),applicable to all courts that there must be an end of litigation,was expounded

in the decision of Re May (1885) 28, Ch D. 516 C.A.

(b) Procedural finality of Judgment. ("Formelle Rechtskraft")

The pre- supposition of the substantive conclusiveness of judgment is its procedural finality. Whereas the substantive finality of judgment means its being non-~~controvertible~~ and binding, by procedural finality of judgment is meant this that it is unalterable by the Court which pronounced it and incontestable by ordinary procedural means (appeal, recourse, revision (review) declaration of opposure in default cases i.e. opening a default and application for procedural reinstatement. In certain exceptional specified cases of hardship and miscarriage of judgment the law allows the procedural finality of a judgment to be set aside by extraordinary procedural measures, such as :

- (1) an application for re- opening of proceedings,
(retrial or rehearing)
- (2) an action of nullity.

a/ When the judgment is immune from attack to ordinary legal measures either because an appeal^a therefrom has been dismissed or because the period to appeal has expired it becomes final and may be put into execution; that it is still assailable by the extraordinary procedural recourses does not prevent the judgment from being final; as long as it is not reversed, it remains final. This is the rule under German law according to para. 705 Code of Civil Procedure (" Formelle Rechtskraft ").

See by law Busch
§ 322 Ann. 2

Under English law by finality is meant that the decree is unalterable in the court which pronounced it and it

does not matter that it is assailable by appeal to a higher court or by extraordinary recourses.

See *Nouvion v. Freeman* 37 Ch D. 244, 255.

Under French law finality is to be distinguished from irrevocability of a judgment; by the latter notion it is meant that the ordinary recourses as well as the extraordinary ones are exhausted in respect of the judgment. On the whole, the view of French law on "finality" of a judgment conforms to that of German law viz. a judgment becomes final where it is no longer subject to opposition or appeal.

The Limits of Conclusiveness of judgment.

(1) The principle of conclusiveness of judgment explained above i.e. its binding power upon the parties and the court applies to the enacting part only of the judgment (French term: "dispositif", German term: "Urteilsformel"), viz. the material point which it decides, but neither to its presuppositions nor to subsequent facts constituting a new cause of a "Rechtsschutzanspruch"; this term has been explained on page 229 thus in case of a decree of dismissal, where a new fact constituting a ground for divorce occurs after that decree a fresh petition for divorce may be founded thereon. *Finney v. Finney* (1868) 1 P & D 483.

See paras. 322, and 616 of the German Code of Civil Procedure. ✓

Under the different systems of law different rules subsist concerning the question how far alterations as to the income of the obligee subsequent to a maintenance order affect such order.

For the English rules on this subject reference may be made to the heading. "Finality of maintenance orders" p.292

By para.323 of the German Code of Civil Procedure it is enacted that such alterations may affect future payments only and that the court is not competent to vary its judgment in respect of the instalments ~~already~~ accrued due.

Such provisions as to variation of maintenance orders are, at any rate, exceptions to the rules flowing from the definition of " conclusiveness " of judgments given above since such factual alterations are not of such a character as to constitute a cause of action.

Finally, in order that issues, such as ~~presupposition~~ to a judgment, may become conclusive , they must be made the object of a declaratory interlocutory judgment, mentioned above on p.191

C h a p t e r X I I I .

Recognition of decrees of divorce. General observations.

(1). The recognition of judgments is under all systems of law concerned differently treated from enforcement of judgments since the latter involves proceedings leading to ~~to~~ material execution on property or to constraint of persons, and therefore more stringent requirements have to be complied with. Judgments may, on the other hand, have full effect, independently of the question whether or not they are put into execution. The transcription of a degree of divorce upon the register of Civil Status, or the use of such decree as a plea to an action are cases in which recognition only as distinct from enforcement is required.

By French jurisprudence this character of a judgment is called " l' autorité de la chose jugée " by which is meant that the judgment is conclusive as *res judicata*, but has no executory force ; a judgment may, in fact, be final and conclusive but not enforceable at all, as for instance, a declaratory judgment which declares only a civil right to be **existent** or **inexistent**; the same applies to a judgment in rem viz: a decree of divorce which operates immediately and absolutely upon the status. From the foregoing observations it is clear that finality and conclusiveness, on the one hand, and enforceability, on the other hand, are not inseparable characteristics of judgments.

(2). One of the requirements of recognition is the subsistence of the foreign court's jurisdiction in the international sense of the term, as distinct from jurisdiction in the territorial (domestic) sense of the term. Hence first of all it is to be ascertained whether the foreign court had jurisdiction to pronounce the decree in question according to the conflict rules of the *lex fori*.

It is, as a rule, immaterial whether the foreign court had territorial (domestic) jurisdiction; i.e. whether the particular Court was authorised by the municipal law of the country to which it belongs *ratione materiae personae* and *loci* to pronounce the degree in question. ("Domestic competence"). International jurisdiction of the foreign court is a requirement of recognition of a foreign decree of divorce under the laws concerned except Italian law, by which both the international and the territorial (domestic) jurisdiction of the foreign court are required.

English law:

First of all, it must be noticed that the Courts of any British dominion, colony, possession, protectorate or mandated State, as well as those of Scotland, Northern Ireland, the Channel Islands and the Isle of Man must be treated as foreign courts for the purpose of the Divorce jurisdiction and of recognition of decrees of divorce. *Yelverton v. Yelverton* (1859) 1 S and T.574. The sole test of jurisdiction in matters of divorce is the domicile of the husband at the date of institution of the suit for divorce, subject to some qualifications which will be considered later. The courts of the country where the husband is domiciled at the institution of the suit for divorce have jurisdiction to pronounce a decree of divorce; this rule was definitely laid down in the case of *Le Mesurier v. Le Mesurier* (1895) A.C.517.

See also the decisions *Bater v. Bater* 1906 P 269, Superintendent Registrar of marriages for Hammersmith ex p. *Mir Anwaraddin* 1917, 1 KB 634, *Keyes v. K.* 1921 P 204, *Lord Advocate v. Jaffrey* 1921, 1 AC 146, AG for *Alberta v. Cook* (1926) AC 444, *H. v. H.* (1928) P 206 and *Herd v. Herd* (1936) P.205.

Previously the courts based jurisdiction in divorce on different grounds such as on:

(1). Place of the celebration of the marriage:

In *Lolley's case* (1812) Ru & Ry 237 the judges held "that no sentence or act of any foreign country or state could dissolve an English marriage (i.e. a marriage contracted and celebrated in England) a vinculo matrimonii for a ground on which it was not liable to be dissolved a vinculo matrimonii in England. "

Lolley contracted his first marriage in England where he was domiciled; after he took up a transient residence in Scotland; the wife obtained a decree of divorce from the Scottish Court on the ground of his adultery. Lolley remarried in England and was found guilty of bigamy. The resolution of the judges in Lolley's case was based on the contractual theory of marriage under which only the *lex loci contractus* (the law of the celebration of the marriage) controlled the marriage status. It is to be observed that at that time, before the passing of the MCA, 1857 the marriage was under English law indissoluble, except by a private act of Parliament, and even this was for a wife available only on the ground of her husband's adultery with aggravating circumstances. The rule laid down in Lolley's case was followed by some decisions, even after 1857, in *Dolphins v. Robins* (1859) 7 HL. 390 *Wilson's Trusts* (1865) LR 1 Eq. 247, *Shaw v. Att. Gen.* (1870) LR 2 P & M 161 but finally overruled by *Harvey v. Farnie* (1882) (CA) 6PD 35, HL, 8C A 43. A Scotsman, Farnie, who was domiciled in Scotland, married an Englishwoman in England; and they afterwards resided in Scotland where he was divorced at the suit of his wife for his adultery. She married the petitioner in England who subsequently brought a petition for annulment of the marriage. Although reliance was placed by the petitioner on the resolution in Lolley's case, it was held that the Scottish sentence dissolving the first marriage was to be deemed valid in England and by all

other countries in the world, since it has been rendered by the competent court of the domicile of the parties.

See also Briggs v. Briggs (1890), 5 PD 163,

Bater v. Bater (1906) P 209.

Thence it is well settled that a divorce pronounced by the competent court of the domicile of the parties for whatever ground is valid everywhere irrespective as well of the matrimonial domicile as of the place of the celebration of the marriage, subject to the requirements for recognition as to foreign decrees of divorce discussed under the heading on p. 243..

(2) Allegiance: Deck -Deck (1860) 2 Sw & Tr 90; the husband after having abandoned his English domicile and although domiciled in America was declared to be bound by allegiance by the rules governing English divorce law. This decision was followed by Bond v. Bond (1860) Sw & Tr 93 .

(3). Residence : In Brodie v. Brodie (1861) 2 Sw & Tr 259 both of the spouses were domiciled in Australia, the husband resident in England ; the courts followed the decisions of the Ecclesiastical courts under which residence within the " diocese " was the ground for jurisdiction. The reference to the Matrimonial Causes Act of 1857, however, was unfounded since para. 27 was not applicable; the decisions of the Eccl. Courts on the other hand, are not binding nor persuasive as regards divorce matters.

(4). " Matrimonial domicile ": The doctrine of matrimonial domicile was applied in the cases of

Tellemacher v. Tellemache (1859) 1 Sw & tr 557,
Yelverton v. Yelverton (1859) 1 sw & tr.574,
Brodie v. Brodie (1861) 2 sw & tr.259,
Manning v. Manning (1871) LR 2 p 7 D 223,
Wilson v. Wilson (1872) LR 2 P & D 435
Niboyet v. Niboyet (1878) 4 PD 1.

The definition of " matrimonial domicil " to be found in those decisions is very vague; it was defined as a bona fide " residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicil " or as the place where it is the duty of the wife to rejoin her husband". This theory has developed principally in Scotland.

(5). Locus delicti commissi : This was based on the penal theory of divorce. The theory by which the petition for divorce might be brought in the court of the place where the marital offence has been committed was rejected in Bradford v. Bradford (1878) 4 PD. 72,73
Dodd v. Dodd (1906) P. 189.

(6). Submission to the jurisdiction , express or implied. In Callwell v. Callwell (1860) 3 Sw & tr 259, the court exercised the jurisdiction in divorce although the husband was not domiciled in England because the wife (respondent) did not object to jurisdiction.

(7) Place of desertion: (Jurisdiction ex necessitate). In Rudd v. Rudd 40 TLR 197 it was held that the deserted wife retained her domicil in the place of desertion as basis for her divorce petition and following dicta in the cases of:

Niboyet v. Niboyet 4 PD 1, 14;
Armitage v. Armitage (1898) P 178,185,
Bater v. Bater (1906) P 209,215-216,
Ogden v. Ogden (1908) P 46,82,

the courts exercised in the cases

Stathatos v. Stathatos 29 TLR 54 and
De Montaigu v. De Montaigu LR (1913) P 154

jurisdiction on the basis of the deserted wife's separate
domicil in England, although her husband had acquired a
domicil in a foreign country where he procured an
annulment of the marriage.

These cases were definitely overruled by the decisions
in Le Mesurier v. Le Mesurier (18⁹⁵) AC 517,
H. v. H. (1928) P 206, and
Herd v. Herd (1936) P 205.

The following are exceptions to the rule of domicil as
test of jurisdiction in matters of divorce:

(1). In order to remove the hardship arising from
change of domicil by the deserting husband, above dis-
cussed, sec. 13 of the MCA. 1937 provides that an English
court has jurisdiction in divorce proceedings where a wife
has been deserted by her husband who was immediately
before such desertion domiciled in England or Wales
notwithstanding that the husband has changed his domicil
since the desertion; the same applies in the case of
deportation of the husband.

*Matrimonial
Causes Act
1 Edw 8 &
1 Geo. VI
c. 57
or he has
been deported*

Some cases of hardship of a deserted wife will still be
not removable despite sect. 13 of MCA. Thus where a
foreigner having no domicil in England or Wales deserts
his wife of British Nationality which he married in
England, and goes abroad, or

where a husband changes his English domicil to a foreign
and deserts his wife afterwards.

At any rate, this sect. 13 of the MCA. means an advanced
step towards assimilation to the rules governing a married

woman's separate domicile under the law of USA.

It is doubtful whether English courts will recognise decrees of divorce rendered by foreign courts whose jurisdiction is based on similar grounds as those regulated in sect. 13 of the MCA.(1937). It is clear that in case where such a decree is recognised by the law of the spouses' domicile English courts will also recognise the decree according to the rules laid down in *Armitage v. Attorney Gen.*(1906) P. 135 discussed above on p.45

It may be that international reciprocity will lead English courts to recognise such a decree even if it is not recognised by the law of the husband's domicile. Although English courts sometimes exercise jurisdiction on a ground which they do not deem recognisable as regards foreign courts there is the case of *Philipps v. Bato* (1913) 3 K B 25 which could support the proposition mentioned above. h/

Under ~~SC~~ rule XI actions in personam are served out of the jurisdiction upon absent foreigners and the respective judgments are enforced by English courts but when asked to enforce a judgment of a foreign court against an Englishman served in the same way, English courts decline to do so on the ground that such procedure is contrary to the principle of international law. Yet in that case of *Philipps v. Bato* an exception to this rule has been made in the case of a foreign judgment in personam concerning a matter accessory to divorce, as awarding damages to be paid by the ~~cor~~respondent to the plaintiff, on the reasoning that the English court could not grant that

relief and the petitioner had to institute the respective proceedings in the foreign court. Although the decision applies in terms only to the case of a "foreign country which is part of the British Empire" and leaves the case of a judgment in any other foreign country open, the same reason would apply to a case in which a deserted wife would be compelled to petition for divorce in the court of her husband's last domicile because of her being deserted under circumstances similar to those specified by sect. 13 of the MCA Act 1937. For these reasons it may be presumed that English courts will recognise a decree of divorce rendered by a court whose jurisdiction is based on grounds similar to those laid down by sect. 13 of the MCA 1937.

(2). Matrimonial Causes (Dominion Troops) Act. (1919)

(9 and 10 Geo 5 c 28) provides that where a marriage was contracted in the United Kingdom during the Great War by a member of His Majesty's Forces domiciled in any of His possessions or protectorates to which this Act applies the competent British Court in that part of the United Kingdom where the marriage took place has regardless of any question of domicile or residence jurisdiction to pronounce a decree of divorce, provided that the married pair have at no time since the marriage resident^d in the country of the husband's domicile. This Act applies only to petitions which were commenced one year after the passing thereof.

(3) By the Indian and Colonial Divorce Jurisdiction Act (1926) 16 and 17 Geo. 5 a 40 Indian Courts exercise jurisdiction in matters of divorce over British subjects domiciled in England or Scotland in cases where the

marriage has been solemnised in India or the marital offence complained of has been committed in India; the petitioner must reside in India at the time of filing the petition and the last common home of the spouses must also have been in India.

The Indian court will refuse to exercise jurisdiction in such a case if the petitioner is unable to show sufficient cause why he or she is prevented from taking proceedings in the courts of the country of his or her domicile.

This Act has been extended to Kenya Colony (Stat.Rul.& O. 1928, Nr. 1635), further to the Straits Settlements (S.R. & O. 1931, Nos.851,1103), Jamaica (S.R.& O. 1932, Nos. 475,646,) Hongkong (S.R.& O.,1935, No. 836) and Ceylon (S.R.& O. 1936, No.562).

(4). Exception with regard to co-respondent:

The jurisdiction over ^{the} co-respondent is irrespective of ^{his} their domicile, residence or nationality; the service of process upon a foreigner may take place abroad without leave in proceedings for divorce according to S.C.R.O.XI and M.C.Rule 9, but such order lacking the requirement of international jurisdiction will not be enforceable by a foreign court, except a Scottish court under the Judgment Extension Act, 1868 .

Rayment v. Rayment (1910) P. 271 and

Rush v. Rush (1920) P. 242.

Whereas domicile is the sole test of jurisdiction in divorce as above stated, English courts exercise jurisdiction to annul a void marriage

M. C. A. 4.6
Supreme Court of
India
(Consolidation) Vol.
1925-26

- (1) when the marriage was celebrated in England, or
- (2) where the parties are domiciled in England, or
- (3) where the parties are resident in England;

finally the English courts exercise jurisdiction in petitions for a judicial separation where both parties to the marriage are resident or domiciled in England.

Recognition of foreign judgments of divorce:

At common law English courts recognise a decree of dissolution of marriage if the parties i.e. the husband has his domicile in the country of the court which has pronounced it; the wife's domicile follows that of her husband. This rule as to recognition of a foreign decree of divorce was expressly stated in the decision of *Shaw v. Gould* (1868) LR 3 HL 55 and in *Harvey v. Farnie* (1882) AC 43, 6 PD. 35, in which latter case the theory of the exclusive jurisdiction of the so-called "English marriage" was expressly disapproved. In *Pemberton v. Hughes* (1899) 1 Ch 781 a decree of divorce on the ground of violent and ungovernable temper of the wife which was rendered by a court in Florida, was recognised by an English court, although the ground of divorce relied on was not admitted under English law. English courts also recognise a foreign decree of divorce although pronounced by a court other than that of the husband's domicile, provided that the law of the latter recognises it as well; decision of *Armitage v. A.G.* (1906) P. 135. This proposition was by comparing the nature of a decree of nullity with that of a decree of divorce also clearly laid down in the nullity case of *Salvesen v. Administrator of Austrian Property*, (1927) AC 641; in this decision the principle has been established that a decree of nullity of marriage rendered by a court of the domicile is to be recognised in the English courts.* It is doubtful

whether English courts will

* see page 196

recognise foreign decrees of divorce rendered by non-judicial authorities; the recognition of a religious divorce by Talaak was refused in R.v. Superintendent Registrar of marriages Hammersmith (1897) 1 KB 634; but cf. Sasson v. Sasson (1924) AC 1007 in which case a divorce of English subjects of Jewish religion domiciled in Egypt, granted by a Rabbinical authority at Alexandria was recognised, and Spivak v. Spivak (1930) 46 T.L.R. 243, 245. Finally those two English Acts, namely the Indian and Colonial Divorce Jurisdiction Act, 1926, (16 & 17 Geo. 5 c 40) and the Matrimonial Causes (Dominion Troops) Act, 1919, (9 & 10 Geo. 5 c 28) contain the rules as to recognition of foreign decrees of divorce, discussed above.

Territorial (domestic) Jurisdiction.

This subject is treated merely in order to contrast the rules as to domestic jurisdiction with those controlling international jurisdiction; yet it must be borne in mind that jurisdiction in the international sense of its term only is a requirement for recognition of foreign decrees of divorce.

A court has domestic jurisdiction if it is selected *ratione loci* (as regards locality i.e. venue) in accordance with the provisions of the relative municipal law and if it has by the same domestic regulations the authority to entertain the action of the type brought before it, (*ratione materiae*).

the Indian and Colonial Divorce Jurisdiction Act, 1926

(16 and 17 Geo. 5 c 40) and the

Matrimonial Causes (Dominion Troops) Act, 1919

Geo 5 c 28)

Foreigners are subject to the *lex domicilii* and therefore equally treated as British subjects are. At common law the plaintiff was free in selecting the ^evenue; later the practice developed of allowing motions to change the venue for reasons of convenience. In ordinary proceedings the court now may fix the venue by an order for directions showing place and mode of trial.

Petitions for divorce are tried before the Divorce Division in London and according to Matr. Causes Assizes Order 1937 the following classes of matrimonial causes may be tried and determined by a Commissioner acting under a Commission of Assize:

- (a) undefended causes within the meaning of the Matr. Causes Rules of 1937 and
- (b) causes brought or defended under Part IV of the Order XVI RSC, which relates to proceedings by and against Poor Persons.

The venue is in such a case the respective Assize town; but may on motion be changed, if hearing is desired at another Assize town with regard to the location of the parties and proposed witnesses.

Scottish law: International jurisdiction.

The rule that domicile is the sole test of jurisdiction in proceedings for divorce, since the decision in *Le Mesurier v. Le Mesurier* is also part of Scottish law, subject to the statutory exceptions contained in the Indian and Colonial Divorce Jurisdiction Act, 1926, (16 and 17 Geo. 5 c 40) and the Matrimonial Causes (Dominion Troops) Act, 1919 (9 and 10 Geo 5 c 28)

This rule was followed in the cases

Low v. Low 19, R 115, Barkworth v. Barkworth, (1913) SC 759;

MacKinnon's Trust v. Inland Revenue (1920) SC (HL) 171.

Brown v. Brown (1928) SC 542.

As to the grounds on which previously divorce jurisdiction was exercised the following observations are to be made:

As to the "special matrimonial" domicile. The doctrine of the "special matrimonial domicile" as a test of jurisdiction was principally developed by the Scottish courts in the

cases Shield v. Shield 15, ~~CS~~, ~~Ca~~, 2nd Series 142,

Jack v. Jack 24 ~~CS~~, 467, Hume v. Hume 24 ~~CS~~, 2nd Series 1342;

As to residence: The Scottish courts exercised jurisdiction in proceedings for divorce where the husband was resident there and the wife was personally cited; forty days' residence was originally required.

As to submission: Jurisdiction could not be founded by submission on the part of a defendant, as stated in Ringer v. Churchill (1840) 2 D 307; but cf.

Watts v. Watts (1885) 12 R 894, where the opposite view was taken, that there was no duty on the part of the court to raise a question of jurisdiction in those undefended cases. Cf. Redding v. Redding 1888 15 R 1102.

As to locus delicti commissi: The theory of locus delicti commissi whereby the courts of the place where the marital offence has been committed and the defender had been personally cited, had jurisdiction in divorce proceedings (Warrender v. Warrender 1835 S & M L 154 and Stavert v. Stavert 1882, 9 R 519) is now overruled.

Place of desertion (jurisdiction ex necessitate):

Scottish cases for that proposition are :

Dolphin v. Robins, 7 HLC.390, Pitt v. Pitt 4 Macq.627,
Madassa v. Southerland 1 F 621,
Redding v. Redding, 15 R 1102,
Pabst v. Pabst 6 SLT 116,
Stezart v. Stezart 13 SLT 668,
Ramsay v. Ramsay(1925) SLT 104.

But there was no jurisdiction of a court of another
place than that of desertion.

Redding v. Redding 15 R 102. These cases could also be
treated as cases of locus delicti commissi.

The divorce (Scotland Act) 1938 contains no provision
similar to that of sec. 13 of the English MCA 1937;
accordingly Scottish courts decline to exercise jurisdiction
ex necessitate in proceedings for divorce by a deserted
wife. Mangrulkar v. Mangrulkar (1939) SC 239.

Recognition of foreign decrees of divorce under Scottish law.

By the earlier decisions Birt v. Boutinez IR Paw D.487
and Edmonstone v. Edmonstone 1816 FC (cited by Fraser
2 nd ed. p. 1331) it was held that the Scottish courts
will not recognise as valid a foreign decree of divorce,
unless the ground of divorce be adultery or desertion.

In Scotland ~~there is now~~ the law as to recognition ^{is now}
assimilated to that of England. Those decisions are now
overruled by the recent authorities of

Humphrey v. Humphrey (1895) 33 Sc LT 99 and

CD v. AB (1908) 737 in which it has been pointed out
that a foreign decree of divorce is entitled to recognition
in Scotland even although the cause for which it was
granted might not be such as would entitle spouses domi-
ciled in Scotland to obtain a decree of divorce in the

Walter 174H.
366

S.C.
✓

R

Scottish courts.

Self governing dominions :

Domicil is the sole test of jurisdiction in divorce in all parts of the British Commonwealth with some exceptions, and the concept of domicil in the English sense of this term is recognized universally throughout the British Empire.

Statutory provisions similar to that of sec. 13 of the English MCA 1937 have for long been in force in most *of the* self-governing dominions.

(a) Australia: In all Australian jurisdictions a statutory provision has obtained for many years whereunder a deserted wife is deemed to have retained her domicil at the time of desertion by her husband for the purpose of proceedings for divorce.

(1) in New South Wales: s.16 of MCA, 1899, Nr. 14, as amended by the Acts No. 3 of 1922 and Nr. 5 of 1929.

(2) in Queensland: s. 3 of the Act of 1923 Nr. 38,

(3) South Australia: s. 43 of the Act of 1929 Nr. 1889

(4) Tasmania: s. 3 of the Act of 1919 Nr. 65,

(5) Victoria: s. 75 of the Act of 1928 Nr. 3726

(6) Western Australia: s. 3 of the Act of 1929 Nr. 7,

(b) Canada: By the Dominion Act c 15 of 1930 ^{it} is provided that where a married woman has been deserted and has been living apart from her husband for at least two years, and is still living, she may in any of the Canadian provinces possessing divorce jurisdiction petition for divorce, notwithstanding that her husband may have changed his domicil, but provided that immediately prior

to the desertion was domiciled in the Province in which the proceedings are commenced.

(c) New Zealand: Sec. 10 of the Divorce and Matrimonial Causes Act of 1928 confers jurisdiction in divorce in the case of " any married person " domiciled in New Zealand for two years at least immediately prior to the petition. Sec. 3 of the Divorce and Matrimonial Causes (Amendment) Act of 1930 concerning a deserted wife provides as follows :

" Where a wife living in New Zealand prays for divorce on any ground and has been living in New Zealand for not less than three years immediately preceding the filing of the petition, and has such intention of residing permanently in New Zealand as would constitute a New Zealand domicile in the case of a feme sole, and has been living apart from her husband, for a period exceeding three years, she shall be deemed to be domiciled in New Zealand, and to have been at the time of the petition domiciled there for two years at least within the section 10 of the Act of 1928."

(d) India and the British colonies:

For the details on the Indian and Colonial Divorce Jurisdiction Act 1926 (16 and 17 Geo 5, c.40) reference is made to p.241. Insofar ^{as} Common Law prevails in the British colonies the courts exercise jurisdiction in divorce including recognition of foreign judgments in accordance with the same principles as those followed in England.

It is noteworthy that the Divorce and Matrimonial Ordinance of 1934 of New Guinea which follows in its general

structure the legislation in force in Australian States, contains the following provisions as to the position of a deserted wife:

(1) . A deserted wife whose husband was domiciled in the Territory at the time of desertion is deemed to retain her Territory domicile, notwithstanding a change of her husband's domicile.

(2). Similarly, a wife petitioning on the ground of non - payment of maintenance, whose husband was domiciled in the territory when the order to pay maintenance or the agreement for separation was made, retains her Territory domicile, notwithstanding that her husband has acquired another domicile.

(3). A wife petitioning for divorce on any ground who has been living in the Territory for not less than three years immediately preceding the filing of the petition, and has such intention of residing in the Territory as would constitute a Territory domicile in the case of a single woman, and has been living apart from her husband for a period exceeding three years, is deemed to have a Territory domicile, and to have had this domicile for two years.

Chapter XIV.

USA law on international jurisdiction.

The states of USA except the state of South Carolina which does not recognise the institution of divorce from bond of matrimony by their statutes exercise jurisdiction in divorce on different grounds, as matrimonial domicile, or separate domicile of either spouse or residence.

It is clear that a decree of divorce rendered at the place where both parties are domiciled is recognised everywhere.

In most jurisdictions the matrimonial domicile is the sole test of jurisdiction; by matrimonial domicile is meant - according to the decision in the Haddock case - the place where the parties lived together with the intent of making that place their home and which was still the domicile of the one spouse when the suit for divorce was instituted.

Perkins v. Perkins 225 Mass. 82, Colleban v. Colleban 65 Misc. 172, 121 NY S 39.

In other jurisdictions there is also separate domicile of either spouse as stated in the Restatement recognised as test of jurisdiction: A state can exercise jurisdiction to dissolve the marriage where one of the spouses is domiciled within the state and the other outside the state if (1) the spouse not domiciled has consented that the other acquire a separate home or by misconduct according to the law of the state where they were domiciled at the time of separation, has ceased to have a right to object to the acquisition of a separate home or is personally subject to the jurisdiction of the state which grants the divorce or (2) the state is the last state

*See Vernier
American
Jan 15, 1929
the 2, 5, 89*

in which the spouses were domiciled together (para.113 Restatement). In *Morris v. Morris* 160 Misc.59.289 , NY.Sup.636 Dom.Rel Court 1936, the court refused to allow a deserting husband to retain the power to change his wife's domicile, and in *Delanoy v. Delanoy* 216, Cal. 27.13 P 2nd 715.86 ALR 1321, 1932, the husband had to establish the propriety of his separation from his wife as a jurisdictional requisite. The action may be brought at the domicile of either spouse *Sewal v. Sewall*, 122 Mass.156.23 Am.Rep. 299.1877, *Watkins v. Watkins* 135 Mass. 83,1885.

But some statutes provide that the action for divorce must be brought at the domicile of the petitioner; in *White v. White* 18 RI 292.27 A.506,1893, an action for divorce by a wife brought at the domicile of her husband was dismissed because she was resident elsewhere.

By para. 43 Restatement a judgment rendered without jurisdiction is invalid everywhere including the state of rendition.

The statutory period of residence required for jurisdiction differs greatly in the diverse states, from three months in Nevada to five years in Massachusetts.

Recognition of foreign decrees:

The courts of USA. recognise in general decrees of divorce pronounced by courts of other states of USA or foreign countries on the basis of the Matrimonial domicile i.e. the domicile of the husband.

Although a wife may acquire a separate domicile of her own in case of consent or guilt on the part of the

husband causing the separation, in such a case a decree of divorce will be recognised under certain conditions only. In *Atherton v. Atherton* (1901) 181 US 155 the facts were as follows :

The husband domiciled in Kentucky married a woman domiciled in New York. The latter deserted her husband and returned to New York. The husband brought a suit for divorce in Kentucky and was successful; the wife also petitioned for divorce in the court of New York which declined to recognise the decree of the courts of Kentucky, but was required to do so according to the "full faith and credit clause."

The leading case on this question is *Haddock v. Haddock* (1906) 201, US 562; the facts of this case are as follows: The spouses were living in New York; the husband went to Connecticut and was granted a decree of divorce there; the wife remaining in New York secured in New York a decree of divorce and the decree of the court of Connecticut was not recognised since New York was the matrimonial domicile; it was held that the New York court had lawfully disregarded the Connecticut decree since the matrimonial domicile had never been in Connecticut.

The *Haddock* case does not purport to overrule the *Atherton* case. In the *Haddock*- case Chief Justice White pointed out as follows:

"It has, moreover, been decided that where a bona fide domicile has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for divorce, the courts of that state, if they acquire personal jurisdiction, also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause."

citing *Chever v. Wilson*, 76 US 108.

*Beale, 1
W. 496*

*Beale,
Conflict of
Laws, 1
W. 497*

The redognition of such decrees of sister states flows not only from the principle of comity but it is also a constitutional duty owing to the "full" faith and credit clause" art. IV of the Constitution which runs :

" Full faith and credit shall be given to the public acts, records, and judicial proceedings of every other state. And the Congress may by general law prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Where a decree of divorce has been granted at the domicile of one spouse alone without taking regard to the requirements laid down in the decisions cited above, there the courts of a sister state cannot be compelled to recognise such a decree since the full faith and credit clause is inapplicable thereto but voluntary recognition has been adopted by some states of the Union. See decision in Doughty v. Doughty 28 NJ. Eq. 581 in which case Beasley C.J. pointed out :

"A judgment of divorce resting entirely on such a contracted foundation as the domicile of one of the parties alone, bears with it, into other jurisdiction, a title to respect and in some cases a claim to voluntary adoption. In such instance, I regard the question whether the judgment shall be extraterritorially enforced to be one entirely resting on the consideration that, in a matter of unusual interest of this nature, an obligation rests upon every government to carry into effect, as far as is reasonably practicable, and as may be consistent with its own policy, all foreign judgments. But an appeal of this kind to interstate comity should, I think, never prevail, when the judgment sought to be accredited has been rendered in violation of that fundamental axiom of justice that the parties, before their rights are adjudged, shall have an opportunity of being heard. A judgment of divorce proceeding from a jurisdiction founded on domicile would not contravene essential rules of natural justice, if actual notice to appear has been served on the defendant residing abroad."

This decision was followed by the decision of Felt v. Felt (Court of Errors and Appeals, 59 Eq.606; 45 Atl. 105).

As to the recognition of decrees of divorce pronounced by courts of other foreign countries there is no provision to be found in the Constitution and the states of the Union are free to pass the respective statements in their statutes but, in general they conform to the same rules. Some states have adopted Section 22 of the Uniform Annulment of, Marriages and Divorce Act which is entitled " Evasion of Laws " and reads as follows:

" Full faith and credit shall be given in all the courts of this state to a decree of annulment of marriage or divorce by a court of competent jurisdiction in another state, territory or possession of the United States when the jurisdiction of such court was obtained in the manner and in substantial conformity with the conditions prescribed in Sections 7 - 10 of this Act. *See Bishop*

Nothing herein contained shall be construed to limit the power of any court to give such effect to a decree of annulment or divorce by a court of a foreign country as may be justified by the rules of international comity; provided that if any inhabitant of this state shall go into another state, territory or country, in order to obtain a decree of divorce for a cause which occurred while the parties resided in this state, a decree so obtained shall be of no force or effect in this state."

The statutes of two states Maine (RS 1930, CH 73, Sect. 12) and Massachusetts (G.L. 1921, CH 208, Sec. 39) contain a similar statement, applying to divorce obtained in foreign countries as well as in sister states.

Territorial (domestic) jurisdiction.

According to the various statutes courts of different

character such as district courts, equity courts, probate courts, courts of common pleas, etc. exercise jurisdiction to grant absolute divorce. The method of fixing venue also varies greatly, some statutes, for instance, enact that the suit for divorce is to be brought in the county or district where the plaintiff is resident, others ordain that the suit maybe brought in the county where either plaintiff or defendant resides; some statutes require residence in the county for a definite period, in addition to residence in the state, as a pre-requisite to suit.

C H A P T E R X V

French law on international jurisdiction.

For some time the French courts held that they possess exclusive jurisdiction over French citizens; this view was founded on art. 3 C.C. under which statutory provisions relating to status apply to French citizens, even though domiciled in a foreign country; accordingly French courts refused recognition to judgments of divorce obtained by French citizens from foreign courts. The French courts following a reviewed interpretation of art. 3 C.C. now hold that their jurisdiction over French citizens in matters of divorce when both parties to the marriage or one of them are domiciled in a foreign country is optional only; hence foreign decrees of divorce obtained abroad under such circumstances are recognised by French courts, provided that the requirements for recognition exposed below are complied with.

If one spouse is of French citizenship and the other a foreigner, the former may petition French courts for a

de la
de La Malille
de Duboyal
Réperloire
no Divorce
no 24, 1917
Planiol &
Report
2, 7, 556

See Bates,
147

e/

divorce according to art. 14 C.C., although the foreigner spouse is not residing in France and even in the case where neither of them is domiciled in France.

Paris, Dec. 11, 1885, Sirey 1885, 2,302.

Art. 14 C.C. reads as follows :

" An alien, even not residing in France, may be summoned before the French courts, for the fulfilment of obligations contracted by him in France, towards a French person; he may be called before the French courts for obligations contracted by him in a foreign country towards French persons."

By common opinion of writers and courts the expression " contract " in that art. includes marriage and marital status since by French law marriage and its incidents are treated as a " c i v i l " contract and as its incidents respectively.

Baton, 7.64

French courts also exercise jurisdiction in the converse case, viz : in a petition for divorce brought by an alien against his or her consort being of French citizenship even when the latter is not residing in France. The relative statutory provision of art. 15 C.C. equally is deemed to be enacted in favour of French citizens since their cases are thus to be determined by the "natural" French judge. The wording of art. 15 C.C. is to the following effect : " A Frenchman may be called before a French court for obligations contracted by him, in a foreign country, even towards an alien. "

As above stated French courts following the basic principle of nationality exercised exclusive jurisdiction over a French citizen and on the same reasoning refused to hear divorce cases in which both spouses were of foreign

citizenship; but since this view often produced great hardship especially in cases in which the foreigners could not have their disputes decided elsewhere and thus that attitude of the French courts was equal to a denial of justice the French courts finally exercised jurisdiction to dissolve marriages of foreigners both being domiciled in France;

(a). When they could not petition for divorce the courts of the state to which they belonged.

Req. June 25, 1918, S. 1918, 1,206.

Seine Nov. 19, 1920, Clunet 1921 p. 184.

Where, on the other hand, a spouse, for instance a German, may sue or be suit for divorce in his national courts, French courts decline to exercise jurisdiction.

Seine, January 20, 1902, p. 809.

Stringent prove of domicile of both parties to the marriage is required by the courts: Seine, Nov. 19, 1920 , Clunet 1921, p. 184;

yet in cases where a wife may under her national law acquire a domicile separate from that of her husband, and establishes such domicile in France, French courts assumed jurisdiction in divorce, provided the wife has no opportunity of petitioning in her own state.

Seine, May 14, 1926.

Present defacto matrimonial domicile is sufficient for jurisdiction. As long as the Hague Convention of 1902 on divorce and separation was in force in France, a suit for divorce could also be brought at the last common domicile of the spouses, according to art.5 of that Convention;

See Plan. de
Rip. 2
m. 536

Bates, 64
73

French courts applied this rule also to parties belonging to states such as Great Britain, which were not signatories to the Convention.

Seine, March 23, 1908.

But since France renounced that Convention the courts are reluctant to recognise the test of the last common domicile as basis of jurisdiction, the matrimonial domicile now must be present, not past in order to found jurisdiction thereon.

Seine, April 26, 1923, Clunet 1923, p. 850.

(b). When the respondent submitted to the jurisdiction of the French courts, submission to jurisdiction may be express or implied by omitting to plea to jurisdiction in due time.

P. & R.
2 m. 536
d/ the
Ruter 72

Seine, April 26, 1923, Clunet 1923, p. 850.

(c). French courts base their jurisdiction also on a ground similar to that laid down by sec. 13 of the English MCA. 1937 in a petition for divorce by a deserted wife.

Seine 21, July 1932, Clunet 1933, 354.

The wife may under such circumstances sue for divorce in the court of the last matrimonial domicile (Nancy, July 4, 1888, Recueil des arrêts de Nancy 1889, p. 66) or in the court of her residence. (Paris, Nov. 12, 1895, Gaz. Pal. 1895, 2776).

n /

(d). Where the crime of adultery was committed in France French courts exercised jurisdiction with regard to the principle of public order: Cass. Dec. 8, 1920, Clunet 1921, (Affaire Gould v. Gould). See the second Gould case on p. 228.

Recognition of foreign decrees:

There are only three articles namely arts. 2123 and 2128 CC and 546 CCP in the French Codes relating to enforcement of foreign judgments. The wording of these articles is as follows : Art. 2123 CC.

- " A judicial mortgage results from judgments either contested or by default, final or provisional in favour of those who have obtained them. It also results from acknowledgments or verifications contained in the judgments from signature affixed to an instrument under private signature creating an obligation. It can be enforced upon the existing real estate of the debtor and the real estate he may afterwards require, with the restrictions hereinafter mentioned. Decisions of arbitrators only carry with them a mortgage when they are accompanied by an order of the court of their execution. Neither can a mortgage result from judgments granted in foreign countries, unless a French court has declared that they shall be enforced ; without prejudice to the provisions to the contrary which may exist in political laws or in treaties."
- Bates, 196*

Art. 2128 CC.

- " Contracts entered into in a foreign country do not establish a mortgage on property in France, unless there are provisions contrary to this principle in the political laws or treaties."

Art. 546 CCP.

- " Judgments rendered by foreign courts and recorded by foreign offices, shall be susceptible of execution in France only in the manner and cases contemplated by arts. 2123 and 2128 CC."

Three theories exist on the interpretation of these obscure provisions:

(1) Some writers and earlier decisions took the view that foreign judgments against foreigners might be enforced while foreign judgments against French subjects were not enforceable in France. The partisans of this view held that art. 121 of the Ordinance of 1629 (Code Michaud)

was still in force and that from the latter in connection with the articles cited above, the sense follows which they attached to those articles.

(2). Other writers and some decisions reject ~~that~~ interpretation and take the view that with regard to the general wording of those articles there is not to be distinguished ^{clear} between foreign judgments rendered against foreigners and those rendered against French subjects and that rather all foreign judgments are to be treated on the same footing : they are to be recognised as conclusive i.e. as res judicata. (French: l'autorité de la chose jugée) but are enforceable (French: force exécutoire) only if the exequatur is granted by the French courts after having examined them with regard to certain specified points such as jurisdiction of the foreign court which has pronounced them, to the question of whether they are repugnant to the order public and the like. (Paris, Febr. 23, 1866, S 66.2.300)

Seine, July 5, 1881, Clunet 1881, p. 530.

Civ. May 9, 1900, S 1901, 1,185. Requ. Nov. 10, 1908, S 1909, 1,172.

(3). The theory of the so-called " revision au fond " i.e. of full reviewability of foreign judgments is now supported by a constant practice of the courts. By this theory foreign judgments are neither recognisable as res judicata nor enforceable by way of execution unless an exequatur is granted by the French courts after having examined them on their merits.

Paris, May 11, 1869, D 71.2.119, S. 70.210
Aix, Febr. 9, 1888, D 89.2.281, S 91.1389
Civ. Dec. 9, 1903, DP. 1906 I 354.

S /

is to be made /

De Lapradelle
cl. ~~de~~
Moyet
Rep.
de Décisions
Judiciaires
Etrangères
Aubry. cl.
Rou X11
2769 ter

Bates
150

Pillet
3.626

Arnaud
3235
disputes.
De Lapradelle
cl. ~~de~~
Dle. Etr. af.
sup.
no 157, ceg

There is one exception to this rule, namely : foreign judgments relating to status such as decrees of divorce are recognised in France independently of any exequatur-declaration, save in case where this judgments involve proceedings leading to material execution on property or to constraint of persons.

Civ. Febr. 28, 1860, S. 60, 1,210. in which case a divorcee was allowed to remarry without having obtained

an exequatur; Seine, April 12, 1923, Clunet 1924, 107, (concerning a German judgment of divorce).

At the time when divorce was prohibited under French law (from 1816 to 1884) the courts decided otherwise.

In the famous case of Beaufremont- Bibesco S 1876, 2,249, Clunet 76.350 and S 1878, 1,201, Clunet 78.505 the

French court of Cassation declared the second marriage of

the Princess Beaufremont to Prince Bibesco void on the

reasoning that the divorce obtained by her in fraud of

the French law abroad was void, since a French subject

must even though residing abroad obey the law prohibiting

divorce; the court held further that the German naturalisation was void for want of consent thereto by her

husband and therefore German law was not applicable.

Whether in case of decrees of divorce obtained abroad

the foreign court had jurisdiction to render them is to be

decided by French conflict rules as to jurisdiction.

Seine, Dec. 18, 1931, Clunet 1932, 680. and

Seine, Febr. 6, 1901, Clunet 1901, pag. 138.

In the latter, the French court declined recognition

to a German decree by which a divorce between Italian

nationals has been granted; the reason given was that

2
Fillet
n. 605 p 683
Am 2 juv
3 n. 290
Planat et
Ripert, I
n. 45
De Lapradelle
et Ribozel
Rip.
no divorce
n. 103, seg

the German court applied according to Prussian law (the German Civil Code was then not yet in force) d o m i c i l i a r y law to the divorce in question which was inconsistent with French conflict rules because according to the latter n a t i o n a l law only is applicable to questions of status. Yet when a foreign divorce judgment is rendered by a competent court in accordance with the conflict rules as to jurisdiction and choice of law, recognition will be granted by French courts as above stated.

French jurisprudence distinguishes clearly between recognition and enforcement of foreign judgments:

See Trib.civ.Seine, April 12, 1923, Clunet 1924, p.107.

Territorial (domestic) jurisdiction: Jurisdiction in divorce is exercised by the civil tribunals of first instance; there is no special chamber or division of the court reserved for proceedings in divorce, except for the court in Paris. As marriage is treated as civil contract under French law the provisions relating to actions in personam also control the question of venue in proceedings for divorce. The venue in proceedings for divorce is the respondent's residence, art. 234 cc and art. 59 ccp, failing a residence, the respondent's abode. Cass. Jan. 11, 1928, D 1928, 102.

Doubtful is where the venue is of a petition based on art. 14 or 15 cc. It is commonly deemed to be the domicile of the plaintiff although the defendant has never lived in France. Paris, Dec. 11, 1885, S. 1885, 2, 302.

It is immaterial whether the defendant is a French citizen or a foreigner. Cass. 16, 1916, Gaz. Pal, May 22, 1919.

a/

Austrian law on international jurisdiction.

(1) As to Austrian subjects.

The Austrian courts exercise exclusive jurisdiction in divorce over Austrian citizens, irrespective of their domicile or the place of celebration of their marriage. Para. 81 (3) of the law relating to Executorial Procedure of May 27, 1896, Imperial Law Gazette 79, decisions of the Supreme Court of Jan. 12, 1909, Gl.U.N.F.4494 and of July 4, 1911, Gl.U.NF. 5525.

(2) As to foreigners.

The Austrian courts exercised jurisdiction in divorce over foreigners whose last common matrimonial domicile was within Austria. It was doubtful whether a foreigner, not resident within Austria, might contract to submit to the jurisdiction of Austrian Courts in divorce proceedings; the view of the Austrian courts was in the affirmative: Decision of the Supreme Court of Dec.14,1909, GlU.NF.4821.

Recognition of foreign judgments.

(1). The statute of May 27,1896,Imp.Law Gaz.Nr.79 relating to executorial proceedings does not contain any statement concerning recognition of foreign judgments.

7 The rules of governing the recognition of foreign divorce judgments have developed in accordance with the relative general principles of private international law and the enactments of the statute mentioned above concerning enforcement of judgments.

The Austrian Supreme Court declared in its decisions ~~to~~ *that it was /* be bound by general principles of private international law to recognise foreign divorce judgments over foreigners

if rendered by a competent court. The Austrian courts investigate, first of all, whether by its own conflicts rules as to jurisdiction any court of the foreign state had jurisdiction in the subject-matter; it is immaterial according to para. 80 (1) of the statute cited above, whether the particular court had the jurisdiction or competency of deciding the particular cause.

Dec. Feb. 21, 1911, GLUNF 5374 , May 17, 1913, GLUNF. 5374.

According to the authoritative interpretation given to para. 240 CCP a foreign judgment may afford a plea of res judicata, provided it is not repugnant to the public policy of Austrian law.

(2) Applicability of the rules stated in point (1) in case of a change of nationality of Austrian Citizens.

As stated above, the Austrian courts exercise according to para§. 76 and 100 of the Jurisdiction Rules and para. 81 (3) of the statute relating to execution proceedings exclusive jurisdiction in divorce over Austrian citizens, wherever domiciled, accordingly, they refused the recognition of judgments of divorce obtained by Austrian citizens abroad.

Territorial (domestic) jurisdiction.

(1) Under Austrian law no special court, comparable to the English Divorce Division, exercises jurisdiction in proceeding for divorce. The civil courts of first instance, Regional Courts, (Landgerichte) exercise jurisdiction in divorce along with that in other ordinary litigation. (Sec. 50, paras. 1 and 2 of the Jurisdiction Rules).

Prior to 1938 there was an exception to this rule insofar as a divorce by mutual consent of Jewish marriages was heard before the lower county courts. (Bezirksgerichte).

(2).(a) As above stated, the Austrian courts exercise exclusive jurisdiction in divorce over Austrian citizens. The courts of the place where the spouses' last matrimonial domicile was, exercise this jurisdiction; this venue is an exclusive one and cannot be changed by an agreement between the spouses. (sec. 76 of the Jurisdiction Rules).

(b). Failing a general or special venue according to sec. 76 JR. mentioned above, the court of the petitioner's general venue is competent, or in case where even a general venue does not lie within Austria the court of first instance (Landgericht of Vienna) is competent. The last mentioned rule as regards venue (2b) applies also to the petition of a wife whose husband ^{who} at the time of the marriage was an Austrian citizen ^{has} and ~~he~~ subsequently gave up or lost his Austrian citizenship.

(3)(a) To petitions of foreigners applies the same rule as to venue as stated above in point 2 a with regard to Austrian citizens. Dec. 28, 1910, GLUNF 5280.

(b). In case ~~were~~ foreigners who are domiciled abroad and had no last matrimonial domicile within Austria, the Austrian Supreme Court fixes on application the venue according to para. 28 of the Jurisdiction Rules.

Dec. of the Supr. Court Dec. 14, 1909, GLUNF 4821.

(4) Retaliatory Jurisdiction against foreigners.

Finally it is noteworthy that Austrian courts exercise in petitions against foreigners a retaliatory jurisdiction

according to para. 101 of the Jurisdiction Rules which runs:

" If in any other state actions on civil causes may be brought against Austrian citizens in such courts which under the present statute possess no jurisdiction at all or a limited jurisdiction only, the same jurisdiction is founded also against the subjects of that state in the Austrian courts."

This retaliatory jurisdiction applies, for instance, as against French citizens; for under art. 14 of the French Civil Code French courts exercise jurisdiction over foreigners, even not residing in France, in dispute arising from contracts entered into by them with French citizens. Since under French law marriage is regarded as a **civil contract**, this article 14 applies also to questions of marital status; hence actions for divorce may be brought before Austrian courts against French subjects, even though they are not resident in Austria.

German law on international jurisdiction.

(A). Exclusive jurisdiction.

German courts possess **exclusive** jurisdiction in divorce where the husband is domiciled in Germany and

- (1) both of the spouses are of German citizenship,
- (2) the husband has lost his German citizenship ; (it is immaterial in this case whether he has ~~acquired another~~ citizenship or not) and his wife retains her German citizenship; or
- (3) both spouses have lost their German citizenship and the husband ^{has} ~~did~~ not acquire ~~another~~ citizenship.

(para. 606, (I) of the German Code of Civil Procedure).

(B). Optional jurisdiction. Where both of the spouses being of German citizenship are domiciled in a foreign country , German courts recognise foreign divorce decrees provided that they have been pronounced by a competent

court and that the requirements specified in para. 328 CCP. are subsisting. A suit for divorce may at the instance of either spouse be instituted in the court of the place of the husband's last domicile in Germany when the husband is of German citizenship ~~although not domiciled~~ in Germany; if he had no domicile in Germany, the suit may be instituted in the court of the capital of that German province to which the husband before 1934 belonged; if he did not belong to any particular German province, the suit may be brought in a court of first instance of Berlin.

(C). As to spouses both of whom are foreigners domiciled in Germany :

Art. 17 of the Introductory Act to the Code Civil declares the jurisdiction of the German court in such case to be conditional on the recognition of the decree of divorce by the national law of the husband. Decision of the Imperial Court of January 5, 1925, RG 109,101; RG 126,353. Where the national law exercises exclusive jurisdiction in divorce, German courts will not assume jurisdiction. To the question whether the foreigners are domiciled in Germany the relative rules of the foreign law apply. Decision of the Imperial Court of Nov. 21, 1929, 126.363.

(D). As to spouses having no nationality, the German courts exercise jurisdiction unconditionally even if the spouses have no domicile in Germany but ^{have} their abode there.

(E). Where the spouses beside their German nationality have also another nationality those provisions only apply

which are applicable to spouses of German nationality.
Decision of the Imperial Court RG 150,382.

(F). As to spouses of more than one nationality, all of them being foreign, jurisdiction of the German courts is conditional on the recognition of the divorce decree by the national law of the husband.

(G). There is further a subsidiary jurisdiction provided for a wife of German citizenship by the statute relating to " the application of German law as to divorce " of Jan. 24, 1935 (Imperial Law Gaz. 1, pag.48); by art. 2 (1) the wife of German citizenship may, where none of the grounds of jurisdiction of a German court under the provisions of the Code of Civil Procedure exists , institute proceedings for divorce in the court of h e r domicile or residence in Germany.

This provision applies, for instance, where a woman of German citizenship marries a foreigner and retains her German citizenship, or where a married wife alone acquires German citizenship while her husband retains his foreign citizenship.

(a) Recognition of foreign judgments of divorce.

Insofar as the German courts exercise exclusive jurisdiction they refuse to recognise foreign judgments of divorce. See J.W. 06,167. Hence when a wife obtains from a court in U.S.A. a decree of divorce against her husband being of German citizenship and domiciled in Germany such decree is invalid in Germany. W 15,144.

(b) In all other cases the German courts will recognise

a judgment of divorce if the requirements specified in para. 328 of the CCP. are complied with.

Para 328 CCP contains the requirements for recognition of foreign judgments, whereas para. 722 CCP and para. 723 CCP contain those of their enforcement; thus German law distinguishes clearly between recognition and enforcement of foreign judgments.

The entering of a judgment of divorce in the registers concerning Civil Status is not deemed to be an act of enforcement but merely of recognition and therefore admissible under para. 328 CCP. without obtaining a judgment declarative of its enforceability ("Vollstreckungsurteil") as required by paras. 722, 723 CCP. for enforcement. Decision of the Imperial Court of May 18. 1916 RG. 88, 244. According to para. 328 CCP. the requirements for recognition of foreign judgments are stated by specifying the grounds on which recognition is excluded.

Recognition is excluded:

- (1) if the courts of the foreign country according to German law have no jurisdiction. Decision of the Imperial Court RG. 65, 330.
- (2) if the unsuccessful defendant is a German national and has not appeared in the proceedings insofar as the original summons has not been served upon him in person in the country of the foreign court nor been served upon him through German legal channels,
- (3) if in the judgment certain provisions of the introductory Act to the Civil Code (Art. 17) have been disregarded to the detriment of a German national. Thus the question whether the substantive law has been applied, may be of importance.

if the conflict rules of art. 17 of the Introductory Act to CC. have not been applied; but if the law according to these conflict rules has been selected, it is immaterial whether there has been an error in the application or interpretation of that law by the foreign court.

(4). Recognition of the judgment offends against rules of common decency or against the avowed purpose of a German legislative enactment and

(5) if reciprocity has not been conceded.

For detailed discussion of the points (4) and (5) reference is made to p. 277, 284.

The examination of the foreign judgment in respect of the requirements stated above is to be made by the courts ex officio. Decisions of the Imperial Court RG 36,381, 75.48.

Frankenstein is of opinion that this rule does not apply to para. 3 of 328 in which case it is left to the party of German nationality to show that the non-application of the relative statutory provisions was causing some detriment to her. *him*

(Territorial (domestic) jurisdiction.

It must be observed that under German law the Civil courts of first instance (Landgerichte) exercise jurisdiction in divorce along with that in other ordinary litigation; and there is no special chamber or division of the court hearing such causes.

With regard to the fact that nationality is by German law the test of jurisdiction in matters of divorce German citizens even when domiciled abroad may institute proceedings

*See Laty. W.
Jurisdiction
+ Recognition
in divorce &
Nationality
Decree 1886*

in a German court;

the venue is to be determined by the domicile of the husband ; when domiciled abroad by the last domicile of the husband in Germany, and failing a last domicile in Germany the venue is the capital of a German province or Berlin according to para. 15 CCP as stated above.

In favour of a wife of German citizenship whose husband is a foreigner or of no nationality there is by art. 2 of the law of the January 24, 1935 Imperial Law Gaz. I, 48 the venue declared to be the place of her domicile or residence in Germany, provided that ~~there is none~~ of the provisions of the CPO regarding the determination of the venue applicable thereto.

In the case of foreigners domiciled in Germany the venue of the divorce proceedings is to be determined by the place of the husband's domicile. See p. 178.

Swiss law :

International jurisdiction. and recognition of foreign judgments of divorce.

(A). Swiss courts exercise exclusive jurisdiction in divorce over Swiss citizens domiciled in Switzerland,

(B) As to spouses of Swiss nationality domiciled abroad:

(1) Swiss courts possess optional jurisdiction in divorce as regards such spouses who may also petition for divorce in the courts of their foreign domicile according to

art. 57,
para. 7 g (1) of the Final Title to the Civil Code.

(2). Swiss courts recognize a foreign decree of dissolution of marriage of Swiss nationals provided that the foreign court had jurisdiction to pronounce it by the law of that foreign country. (ib.)

(para. 7 (3) l.c. and Cour de Geneve SIJ 26,359,
Federal Court 56,2,335. Clunet 32.225.

(C) (1) As to spouses of foreign nationality:

The Jurisdiction of Swiss courts in divorce in such cases is conditional upon the petitioner's domicile existing in Switzerland and on proof that the constant legal practice of the national law recognises the jurisdiction of the Swiss court as well as the ground of divorce relied on.

^{art. 59,}
Para. 7 h I. l.c. (2) Thus in case where one of the spouses is of Swiss and the other of foreign nationality and both are domiciled in Switzerland, Swiss courts will exercise jurisdiction in proceeding for divorce by the Swiss spouse unconditionally, whereas in the case of the foreigner spouse being the petitioner, jurisdiction of the Swiss courts in divorce is conditional upon the same facts as stated in point (1).

(para. 7 g I, l.c.) St. Gallen SJZ. 26,9.

Where only the foreigner defendant (an American) was domiciled in Switzerland, while his wife the petitioner was domiciled abroad (Dresden) an action for divorce was dismissed by the Swiss court for lack of jurisdiction. Zurich, Oct. 7, 1930, Z. 43,47.

Territorial (domestic) jurisdiction.

The test for the selection of the competent court is the domicile of the petitioner according to art. 144 ZGB. Though the domicile of the wife follows, as a rule, that of her husband (art. 25 ZGB) the wife may acquire a domicile different from that of her husband, in case her husband's domicile be unknown or when the wife is legally

entitled to live apart from her husband. Thus a wife having acquired a domicile separate from that of her husband (by art. 25 I CC.) may bring the petition in the court of h e r domicile. The same rule applies to foreign petitioners except for the restrictions under para. 7 (h) ^{art. 27} of the Final Title to the Swiss Civil Code. Italian law:

Recognition of foreign judgments of divorce.

The institution of divorce is unknown to Italian law and as stated above Italian courts now decline to exercise jurisdiction in divorce over foreigners domiciled in Italy. On the other hand, they recognise judgments of divorce obtained by a foreigner from a foreign court according to his national law, on the reasoning that such recognition does not involve a " fieri " because the foreign court has by its judgment established a legal relation without leaving any opportunity of interfering.

Cass. Florence Dec. 6, 1902, *Monitore D. Tri.* 1903, 43.

App. Milano, July 10, 1931, *Rev.* 1931, 295,

App. Rome, June 26, 1930.

Monitore 1930, 705.

There are different views among writers and courts as to the extent of the examination of a foreign judgment. Some writers take the view that judgments on statuses viz. judgments of divorce ~~do~~ need not any "giudicio di deliberazione" and that the inquiry may be restricted to a specified set of formal requirements, whereas others are of opinion that in all cases a stringent inquiry

*giudicio
deliberazione*

must be made on the merits of the judgment, before recognition can be granted. (giudizio di delibazione). A complete review of the judgment on his merits takes at any rate place in case of a judgment in default; in such case according to art. 941 CCP. as amended by the decree of July 20, 1919, the inquiry extends apart from that as regards international jurisdiction also to the question of territorial (domestic) jurisdiction of the foreign court which rendered the judgment and the case may also be retried.

*conf. 564
test. 1919
in Ital. last
"Larling"*

In case of a change of nationality by the spouses of Italian nationality ~~the~~ new national law concerning divorce is to be applied, except for the case of fraud in acquiring the new foreign nationality. In the latter case (of fraud) the courts refuse to respect the new national law of the spouses and apply only their last common law. Appel. Bologna in Riv. 31, 567.

Since under Italian law, divorce a vinculo matrimonii is not recognised, Italians often procure the dissolution of their marriage in the following way:

They take up residence for some time in Hungary, where divorce is recognised, and acquire, mostly by means of a process of adoption, Hungarian citizenship, and then obtain the divorce from the Hungarian court in the place of their residence. The Italian courts hold such divorce decrees as valid without any further examination into the validity of the change of nationality of the spouses; They consider, however, this rule as applicable

71

only where both of the spouses have acquired the foreign nationality, and taken up their domicile in the respective foreign country.

App. Roma Rev. 23, 1933.

Hence where the Italian husband only acquired the foreign nationality and took up his residence there, while the wife retained her Italian nationality and did not follow him, the Italian courts regard such foreign decree of divorce as invalid on the reasoning that it was fraudulently procured and therefore the last common law (Italian law) governed the question of divorce.

Decision of the appellate court of Florence, March 10, 1923, Journal de droit international privé (Clunet) 50 (1923) 1021.

The rules as to jurisdiction and choice of law laid down in the Hague Convention II of 1902, on divorce and judicial separation, to which Italy still is a signatory, are applied by Italian courts not only as regards nationals of states signatories to that Convention, but universally. Chapter XVI.

1. Reciprocity as requirement for recognition.

Anglo - American systems.

At common law no reciprocity is required for recognition or enforcement of foreign judgments. As it will be shown below, the requirement of reciprocity now is adopted by some English statutes regulating the enforcement of foreign judgments and orders. So far as common law of the Anglo- American systems is concerned reciprocity is no requirement for recognition and this point is

D

the

expressly stressed in the decision of Schibsby v. Westenholz. LR 6 Q B 155; In this way Common Law would seem to remove one of the obstacles to international intercourse. The statutes mentioned above, on the other hand, apply mainly to the British Commonwealth. Hence the requirement of recognition is a matter of indifference because the main principles of the law system are common to all parts ; second, since these statutes apply in regard to the subject discussed here only to matters accessory to divorce, they might indirectly only be operative in respect of decrees of divorce. The same rule obtains in U.S.A. in general ; see decision of Dunstan v. Higgins 138 NY 70 (1893) , NY. Court of Appeal.

(1870) 8
Reciprocity
not even
mentioned

Austrian law.

It is doubtful whether reciprocity is a requirement for recognition of foreign judgments of divorce. Some writers take the view that para. 79 at seq. of the statute relating to executory proceedings concerns only enforcement of foreign judgment; hence the requirement of reciprocity contained in that section does not extend to recognition of foreign judgments.

German law. As above stated, reciprocity is among the requirements for recognition of foreign judgments. But under para. 2 of sec. 328 of CCP. no reciprocity is required in the case of a litigation of non-pecuniary character provided, that jurisdiction of a German court for that controversy did not subsist under the German conflict rules as to jurisdiction.

a

By reciprocity is meant that the courts of the state in question ~~are~~ ^e executing the practice of recognising foreign decrees of divorce in a manner similar to that of Germany; on the other hand when the courts of that state do not recognise foreign decrees of divorce at all or do so only upon conditions prejudicial to foreigners or upon conditions more stringent than those prevailing in Germany, no reciprocity is deemed existent, as for instance in the case of the French courts which recognise foreign judgments only upon retrial of the whole cause of controversy, or in the case of Italian courts which are by their law required even to investigate whether the foreign courts had the so-called territorial (domestic) jurisdiction besides that of the international jurisdiction.

A general definition of reciprocity is not given by the German Civil Code.

Art. 31 of the Introductory Act to the German Civil Code treats of "retaliation" which is an entirely different notion from that of "reciprocity".

By art. 31 l.c. with the assent of the Federal council it may be ordered that a right of retaliation be applied against a foreign state as well as against its subjects and their legal successors. There is no case of such a retaliation order known as regards family law.

2. The principle of public policy .

English courts will refuse recognition of foreign judgments if they are repugnant to English public policy. That is to say if they involve infringement of fundamental

principles of English law or of the English idea of morality. An exact definition of " public policy " cannot be given since this principle is susceptible of constant change to suit the changing conditions of society. The marriage relation and all legal relations based thereon are governed by the principle of public policy; as for instance, the husband's liability for the wife's maintenance is based on general public policy. The law of marriage and divorce is thoroughly affected by this principle. In the recent decision *Fender v. St. John Mildmay* 1938 HL (E 1) the authorities concerning application of the principle of public policy to questions of the marriage relation have been reviewed and it has also been pointed out there how different the policy of law as to marriage before the Reformation has been from that after the Reformation; it was held in that decision that a promise made by one spouse after a decree nisi to marry a third person after the decree nisi has been made absolute was not void as against public policy and action for damages for breach of the promise was maintainable by the third person.

The determination of what is contrary to the so-called policy of law necessarily varies from time to time and in this connexion that significant dictum of ⁴⁴ Brough J. in *Richardson v. Mellish* (1824) 2 Bing 229 may be mentioned which was to the following effect :

" Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you."

? Brough
252

There is, first of all, to mention that with regard to the English conception of morality the jurisdiction of the English courts in matrimonial matters is confined to a monogamous marriage and therefore inapplicable to polygamous marriages although the latter might be recognised in some other respects.

Hyde v. Hyde. LR 1, P & M. 130.

Rex v. Hamersmith Superintendant Registrar of Marriages (1917) 1 KB 634,

Nachimson v. Nachimson (1930) P 217.

The English courts recognise divorce decrees pronounced by competent courts, upon condition that the proceedings down to the decree do not offend against the principle of natural justice. Lack of knowledge of the action by the respondent is a ground for refusing recognition to the decree in that way procured.

Again, if the litigant was prevented by the foreign court from presenting his case, this is regarded as a violation of the fundamental axiom of justice that the parties, before judgment is rendered, shall have an opportunity of being heard. Rudd v. Rudd. (1924) P 72.

But not every irregularity of procedure is deemed to be offending against public policy and natural justice respectively.

Pemberton v. Hughes (1899) 1 Ch 781, 799.

A divorce decree of a foreign competent court is recognised by English courts even when the ground of divorce relied upon is not known to English law.

Rudd v. Rudd (1924) P 72, 40 LTR 197.

Harvey v. Farnie (1882) 8 AC 43,

Pemberton v. Hughes, 15 TLR 211, (1899) Ch 781 AC

Bater v. Bater (1906) P 209 AC, 22 TLR 408.

3. Fraud : Another ground for refusing recognition. to a foreign divorce decree is this that it has been obtained by fraud.

Dolphin v. Robins (1859) 7 HLC 390,
Bonaparte v. Bonaparte (1892) P 402, Green v. Green (1893) P 89.
Armitage v. Att. General, Gilly v. Gilly (1906) P.135.
Constantinidi v. Constantinidi (1903) P 246.
Shaw v. Gould (1868) 3 HL 390.

Yet an English court will not hold a foreign decree of divorce invalid on subsequent proof of collusion between the parties, although collusion is an absolute bar in English law if discovered before decree nisi is made absolute.

Crowe v. Crowe (1937) 2 All E.R.723.

If the court has acted fraudulently, this may be a ground for refusing recognition to a decree of divorce.

A decree cannot be impeached by a third party who was not a party to the original proceeding .

Bater v. Bater (1906) P. 209.

At any rate; in cases only in which impeachment of a foreign judgment is sought on the ground of fraud, retrial may take place, otherwise only, if the fraud goes to the root of jurisdiction, but not if it relates to the merits. Thus where the foreign court has been misled as to the question of domicil of the parties to the proceedings.

(1) There are statutory exceptions to this rule; sec.1 subs.5 of the Indian and Colonial Divorce Jurisdiction Act. 1926 provides that the decision of a High Court in India, or on an appeal therefrom, as to domicile of the parties to a marriage shall for the purposes of that Act be binding on all courts in England, Scotland and

Dick 437
Bater v.
Bater (1906)
P.209 218
See Badala
v. Lantz (1850)
2528d.
C.A.310

India. Hence ~~if~~ the decision as to domicile had been obtained by fraud it is not impeachable on that ground.

(b) A judgment registered under the Judgment Extension Act 1868 cannot be ~~be~~ impeached on the ground of fraud unless and until it is set aside by proper proceedings in the original court in Scotland or Northern Ireland as the case may be. *Wotherspoon v. Connolly* (1871), 9 M 510.

4. Principle of public policy under U.S.A. law. The recognition of a foreign judgment is excluded if it is repugnant to any established an important policy or to the canons of morality of civilised society. By art. 4 para. 1 of the Federal Constitution it is laid down ~~that~~ in every state full faith and credit shall be accorded to any judgment had in any other state of the Union; this clause precludes the operation of the principle of public policy between the states of the Union.

5. Principle of public policy under French law.

Art. 3 cc declares that laws of police and public security are binding upon all those who live in the territory of France. Although this statutory provision does not expressly refer to private international law it was by the French writers interpreted as a conflicts rule and became in that way the basis upon which they built up the doctrine of the "ordre public".

Order public is the most important principle in French international law. The writers and courts have constantly ~~searched~~ ~~for~~ some phrases to express the exact idea, but since the subjects to, which this

principle might be applied are of very different a character it was entirely impossible to give an adequate definition of that principle.

Laurent takes the view that "acts against order public are such as infringe social rights, i.e. "rules relating to rights of society its conservation and perfection."

Brocher distinguishes between "order^{re} public interne" and "order^{re} public international". To the former applies the rule controlling the particular subject matter, to the latter the "territorial law".

A foreign judgment is deemed to be against public policy

(a) when it is based on a law which is not applicable by the French rules of conflict of laws and

(b) when it ~~is~~ ^{is} infringing French substantive law relating to French citizens; Thus French courts decline to recognise Swiss judgments of divorce over French citizens on the reasoning that the latter renounced the appeal from that judgment and thereby made the judgment equal to a judgment by consent; since divorce on mutual consent is not recognised under French law that decree was held ^{to} offending against the ^{rule of-} order public. The grounds of divorce are covered by the principle of public policy Trib. Seine May 2, 1918, Clunet 1918, 1182; mutual consent and insanity which are grounds of divorce under some laws are deemed repugnant to French public policy.

6. Principle of public policy under Austrian law.

Under para. 2 and 4 of sect. 81 of the statute relating to executorial procedure (Executionsordnung) Austrian courts are required to refuse recognition of foreign judgment

(a) if an act is to be enforced which is by Austrian law held to be immoral or inadmissible or be if by the execution sought a legal relation ~~is to be recognised~~ or a claim to be effectuated which under Austrian law is void or not actionable with regard to public policy or morality. The scope of the conceptions of public order and morality is very vague and all depends largely upon the circumstances of the case. The meaning of these expressions is changeable according to the change of social and political views.

Thus the statutory provisions of paras. 62 and 111 whereunder a marriage entered by a Roman Catholic as indissoluble were held to be of public character and accordingly marriages of former Austrian citizens and the proceeding divorces obtained abroad were held void and the change of nationality was disregarded.

Decision of the Austrian Supreme Court, July 1, 1903, Gl UNF 2394.

This decision was followed by ~~series~~ of others and lastly overruled by the decision of June 18, 1907, Gl. UNF. 38111 by which such a judgment of divorce was recognised on the reasoning that the change of nationality being an administrative act is not reviewable by the court.

7 Principle of public policy under German law.

As above stated it is provided by para. 4 of sec. 328 CCP that recognition of a foreign judgment is to be declined if it offends against rules of common decency or against the avowed purpose of a German legislative enactment.

No exact test by which to designate those provisions

that fall within the scope of the above statutory provision can be given. The Imperial Court defined the principle of public policy in its decision RG 119,263 as follows :

" The application of a foreign rule is deemed to be repugnant to German law when the political and social views underlying the German law and the foreign law respectively are of such different a character that the application of the foreign rule would be an attack against fundamental principles of the German political and economic standard of life ".

Under German law its grounds of divorce are not covered by the principle of public policy; but they take account of this principle insofar as it is applied by foreign law to divorce. The dissolution of a marriage of a foreigner by a letter of divorce (religious divorce) was recognised since the national law of the foreigner concerned recognised such divorce.

Dresden, Dec. 22, 1931, I.P. Resp. 1932 Nr. 72.

On the other hand, by the decision K.G. Febr. 16,1909, R.O.L.G. 19,106, a judgment of divorce obtained from the court of the state of New York was not recognised as being against public policy because it imposed a restriction upon the guilty party viz. forbidding remarriage till the death of the innocent party.

Finally it was not deemed to be against German public policy where parties obtained by collusion a decree of divorce from a foreign competent court since the facts that established the ground of divorce would also by German law amount to a cause of divorce. JW 28,3046.

8. Principle of public policy under Italian law.

Art. 11 CC (identical with art. 3 of the French CC).

and art. 12 CC relate to the principle of public policy. Mancini's doctrine that the law of a state consists of two parts, the "national" law and the rules concerning public order, i.e. the "territorial" law and that the national law of a foreigner is to be recognised so far as it is not repugnant to the rules concerning public order, was followed by the Romanistic school which developed further this doctrine of public order; they are till now not in agreement as to the question which rules of a given law fall into the scope of public order. Whereas some writers define public policy as consisting of the prohibitory rules, others denominate it as being distinct from the prohibitory rules.

As above stated Italian law recognises no divorce and Italian courts ^{as a consequence} eventually decline to apply foreign national laws to matters of divorce as being contrary to public policy. As Italy still is signatory to the Hague Convention of 1902 on divorce and separation, the operation of the principle of public order is precluded with regard to persons belonging to one of the Treaty Powers.

9. Principle of public policy under Swiss law.

Swiss courts decline to recognise judgments of divorce by declaration (by letter of divorce) since it is regarded as offending against public policy. ^{Sw} On the rest, judgments of divorce procured by foreigners from foreign courts are recognised even when the foreigners are domiciled in Switzerland. Decision of the Federal Court 46,1,458; 56,2,334. But Swiss courts decline to recognise judgments of divorce in cases where they would have had exclusive jurisdiction, i.e. in the case of Swiss nationals domiciled in Switzerland or when the matter of divorce

had already been decided by them.

10. As to recognition of decrees of divorce imposing restrictions to remarriage.

As a rule, the spouses after having obtained an absolute decree of divorce, are free to marry again. Yet there are some restrictions to the right of re-marrying under the different systems of law.

(A). Some of the laws restrict the right of a divorced wife to re-marriage by a limit of time, so as to avoid any doubt as to the legitimacy of offspring. Under French Civil Code (Art. 296) and German Civil Code (Art. 11 of the law of 1938) the divorced wife may not contract a new marriage before 10 months have passed since the dissolution of the marriage.

(B). Some of the laws on the other hand disallow remarriage where divorce has been granted upon adultery.

I. Scottish law see p. 118.

II. By French Civil Code (Art. 298) and German Civil Code (Art. 9 of the law of 1938) the spouse who has committed adultery must not marry his (her) accomplice; under German law this restriction is conditional upon the fact that the adultery is stated in the decree of divorce as ground.

III. By Swiss law (Art. 150 of the Civil Code) the spouse, expressly by the decree declared guilty of divorce, is to be interdicted ^{from} to contract a new marriage ^{during} before a period of 1 - 2 years, or in the case of a divorce granted on the ground of adultery, ^{during} before a period of 1 - 3 years ~~has passed~~ since the dissolution of the marriage. *The length of the delay is fixed by the judge*

*Abrogated
by Loi 15 Dec.
1904
See Jousse
Cours de Droit
Civil Positif
Français
17962
par. 3*

(a) Under English law restrictions regarding remarriage imposed by a foreign decree of divorce are disregarded in accordance with the general principles concerning recognition of foreign judgments, insofar as by the rules of classification those restrictions are deemed to be of penal(quasi- penal)nature.

Thus a restriction imposed upon a guilty party to a divorce by the South African Court was held penal and the subsequent marriage contracted by that party valid; the relative statute provided that the guilty party must not remarry as long as the other party remained unmarried. See Scott v. Att. Gen. (1886) 11 P.D. 128.

On the other hand, where a statutory provision forbids the parties to re- marry before a certain period has elapsed, this limitation was held operative in England since the finality and conclusiveness of the decree of divorce was in the same way postponed as if it were a decree nisi.

See Warter v. Warter (1890) 15 P 152.

(b) . French Courts equally hold such provisions restraining one of the spouses from re- marrying as repugnant to their " ^{re}ordre publique " and refuse recognition to judgments restraining one of the spouses from re- marriage. See Trib. Marseille , Nov. 28,1925,Revue 1926,537. The same rule obtains in Germany; as above stated,a divorce obtained from a court of New York was not recognised by a German court as offending against publi policy because it imposed a restriction upon the guilty party, viz. forbidding re-marriage till the death of the innocent party. Decision K.G. Febr. 16,1909,R.O.L.G.1906.

Decy 7.472

Chapter XVII.

Enforcement of orders and judgments concerning matters
ancillary to divorce.

At common law. The rules as to enforcement of foreign judgments concerning ancillary matters to divorce are different from those as to recognition of foreign decrees of divorce, as above stated.

Divorce itself is of constitutive nature, that is to say it constitutes the change of the matrimonial status by itself; the decree of divorce operates immediately and absolutely upon such change of status and no proceedings are necessary in order to enforce such a decree.

Yet the decree of divorce contains implicitly a judicial order directed to the party against whom the decree of divorce has been granted, of quitting the conjugal home; because of shortage of accomodation or for some other reasons a case may arise in which the divorcee declines to quit the hommon home. As a rule, it has hardly ever been necessary to take executory proceedings for enforcing actual separation from the divorcee since such questions are, usually settled by the provisional measures ordered by the court as soon as the petition has been instituted, and these measures become definite by the decree absolute without any further action being necessary. But there may be a great number of judgments and orders relating to matters ancillary to divorce as to which the question very often arises as to whether and under what conditions they are enforceable; such orders or judgments founded on a decree of divorce relate, for instance, to costs, the custody of, and access to, children of the marriage, maintenance, damages to be paid by the co-respondent, etc.

Dicty 453

At common law foreign judgments can only be enforced by an action brought thereon. The actions which are to be brought on such foreign orders or judgments are not actions in rem, although they are based upon a decree of divorce, but fall within the category of actions in personam. To all the actions upon such foreign judgments or orders apply the common law rules except for those covered by the statutes discussed below, under the heading. Statutes on p. 295.

The requirements of the actionability of such foreign judgments or orders are similar to those relating to foreign judgments in personam, subject to some qualifications, as will be shown presently.

(a). First of all the plaintiff who seeks to enforce such a foreign order must prove that the decree of divorce upon which the order is founded, is valid according to English law. In the decision of *Simons v. Simons* (1938) 55 TLR 120 the enforcement of a foreign maintenance order was refused because the divorce decree was deemed to be invalid by reason of lack of jurisdiction since the defendant's domicile was English.

(b). A further requirement for the actionability of a foreign judgment or order is that it has been rendered by a court of competent jurisdiction. Such matters are in respect of jurisdiction controlled by rules different from those controlling petitions for divorce. According to the decision of *Emanuel v. Simon* (1908) KB 302, the following are possible grounds of jurisdiction of foreign courts in actions in personam recognised by Common law:

*And see
Papadimitriou
v. P.
46 T.L.R. 44
[1950] R. 55*

- (1) . Where the defendant is a subject of the foreign country in which the judgment or order has been obtained;
- (2), where he was resident in the foreign country when the action began;
- (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;
- (4) where he has voluntarily appeared; and
- (5) where he has contracted to submit himself to the forum in which the judgment was obtained,
- (6) by the decision of Philipps v. Batho (1913), 3 KB 25 a sixth ground has been added to this list of Emanuel v. Simon.

It may be observed that in this sixth case the exceptional rule applies whereunder nationality (but not domicile) of the defendant was held a sufficient test of jurisdiction of a foreign (Indian) court to make its judgment enforceable. This new class includes, at least, judgments in proceedings in personam ancillary or accessory to the dissolution of a marriage of persons domiciled or otherwise by command of the Sovereign, within the jurisdiction of the court pronouncing the judgment, where both the Court pronouncing the judgment and the Court enforcing it are courts of the same Sovereign, and where the court enforcing it cannot itself grant the relief because it has no jurisdiction over the marriage, and its dissolution, though it can grant similar ancillary relief.

- (c) From the standpoint of private international law, the most important and interesting requirement for actionability of foreign judgments is that of the forum con-

inconveniens, also called that of the effectiveness, under English law. If an English judgment were ineffective abroad or proceedings in England were vexatious, the court may in exercise of its discretion refuse to entertain the action.

Tallack v. Tallack (1927) P 211.

The judgment would have been ineffective as there was no property in England. In the case of

Goff v. Goff (1934) P 107 the court declined to exercise jurisdiction in an action for variation of a marriage settlement founded upon an English decree of divorce on the ground of forum inconveniense; the facts of this case were as follows :

The petitioner procured a divorce from an English court and brought an action in the English court for variation of her marriage settlement whose trustee was a New York Bank; since under New York law foreign judgments cannot be enforced in any case where the defendant has not been served personally within the jurisdiction of the court which pronounced the judgment, the court after institution of the action set the service aside on the ground of forum inconveniense and refused to exercise jurisdiction.

(d) The foreign judgment must be final and conclusive according to the rules of English law, which are laid down by the decisions of *Nouvion v. Freeman* 37 CH D 244 and *Harrop v. Harrop* (1920) 3 KB 386:

" In order that a foreign judgment may be enforceable in an English court, it must be a final and conclusive judgment of the court by which it was pronounced, and it is not a final and conclusive judgment if that judgment is liable to be abrogated or varied by that

court; but it is not prevented from being a final judgment by reason of the fact that it may be the subject of an appeal to a higher court."

This rule was followed by the Irish case of *Mc Donnel v. McDonnell* 2 Ir. Rep. p. 148 in which an alimony order of a court of the State ^{of} Montana was held not enforceable because of lack of finality. Gordon J. said :

" Even though the plaintiff had a final judgment for each monthly instalment of maintenance, the order of the court of Montana, directing payment thereof into court until further order, was not a final judgment that ~~the deceased~~ was indebted to the plaintiff in L 480, the total of such instalments."

The powers of the Court, under English law, to modify orders for maintenance are now regulated by s.14 of the Administration of Justice (Miscellaneous Provisions) Act 1938 (11 and 2 Geo. 6, c. 63).

The court has power to alter even past payments; such orders cannot, therefore, ^{be} deemed final. Since, in contrast, thereto by the law of the State of New York, the proper court of that State was not competent to vary its judgment in respect of the instalments already accrued due and in arrear, it was held in the decision of *Beatty v. Beatty* (1924) CA 807 that such a judgment obtained from a court of the State of New York was in respect of the said instalments so accrued due, a final judgment and therefore in that respect enforceable. In the decision *Sistare v. Sistare* 218 US 1 (1910) which was cited in *Beatty v. Beatty*, it was held that such alimony decrees are final in the sense that the "full faith and credit clause" was applicable to the

vested past due payments, even though subsequent payments may be modified to conform to altered circumstances.

In cases other than maintenance ~~an~~ judgment will be enforced if this requirement of finality is complied with. (In cases concerning costs, damages, custody of children, etc.)

(e) the foreign judgment must not be repugnant to English public policy or against natural justice.

For details on this subject reference is made to p. 276.

(f). Foreign judgments concerning matters ancillary to divorce are, as above stated, judgments in personam and therefore not merely impeachable for fraud going to the root of jurisdiction, as foreign decrees of divorce, but also for some other kind of fraud, and by alleging that the person who seeks enforcement of the foreign judgment has fraudulently induced the foreign court to reach a wrong decision; the original cause may be retried on its merits.

Abouloff v. Oppenheim (1882) 10 QBD 295, Vidala v. Lawes (1890) 25 QBD 310 and Ellerman v. Read (1928) 2 KB 144, Codd v. Delap 92 LT 510 H.L.

(g). The amount of the sum of damages to be paid by the co-respondent or of maintenance adjudged upon by the foreign judgment must be fixed .

An action lies to recover costs awarded in a divorce suit by a foreign court, insofar as the requirements stated above are complied with.

Russel v. Smyth (1842) 9 M & W. 810.

(h) Finally, an English court will not enforce a foreign judgment, which cannot be sued on with regard to the Statute of Limitation.

In which case it will also be necessary to inquire into the foreign rules as to limitation of actions, reference is made to the heading Substance and Procedure on p.187. Statutes. The Common Law rules stated above relating to enforcement of foreign orders and judgments concerning matters ancilliary to divorce have been modified in some respects by statutes which will be discussed presently. The rule that a foreign judgment can be enforced only by an action brought thereon has been abandoned, at least in part within the purvue of these statutes, by enabling foreign judgments to be registered under these statutes if certain specified conditions are complied with; registration is, however, optional only, the judgment creditor may avail himself of the common law rule and sue on the judgment. After registration the judgment has the same force and effect as if it had been obtained from the registering court on the date of the registration.

The statutes which relate to enforcement of foreign judgments are as follows :

(a). The Judgments Extension Act of 1868 (31 & 32)Vict.c.54).

This Act applies to judgments of Supreme Courts in the different parts of the United Kingdom; it ceased to apply to the Irish Free State. Since the Judicature Act 1873 this Act applies to all judgments of the High court (in England) pronounced in its respective divisions, but only

to judgments in which the cause of action has been a debt, damages or costs; it is immaterial whether the judgments are in default or in foro. This Act does not apply to judgments in rem; by sect. 8 it is provided that it does not apply either to judgments in absence pronounced by the Court of Session in Scotland where jurisdiction has been founded on arrestment. No action on the judgment is necessary for putting it into execution; if the certificate is registered the judgment has the same effect as if it were pronounced by the registering court.

Under this Act an order awarding damages or costs against a co-respondent is registerable and enforceable.

Rayment v. Rayment(1910) P 271 and

Rush v. Rush (1920) P. 242.

The registering court does not examine the judgment on its merit and if it is registered it is not impeachable^a or on fraud and even want of jurisdiction of the Court which pronounced the judgment has been disregarded by Scottish courts. Wotherspoon v. Connolly (1871), 9 M 510.

(b.) Administration of Justice Act (1920, (10 & 11 Geo.V c.81)

Under this statute judgments rendered by a Superior Court of any British Dominion, protectorates or mandated territories are capable of registration in the High Court of England or Court of Session in Scotland, and vice versa. According to sec. 9 of Part II of this Act; the requirements of registration of such judgments are as follows :

A Dominion court judgments to which this Act would otherwise apply will not be registered: if

- (1). there is no jurisdiction in the original court,
- (2). the judgment debtor did not voluntarily submit or agree to submit to the jurisdiction of that court.
- (3). the judgment debtor being a defendant in the proceedings was not duly served with the process of the original court and did not appear notwithstanding that he was ordinarily resident or carrying on business within the jurisdiction of that court or agreed to submit to its jurisdiction; or
- (4) the judgments was obtained by fraud; or
- (5) the judgment debtor satisfies the registering court either that an appeal is pending or that he is entitled and intends to appeal against the judgment; or
- (6) the judgments was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

After registration the registering court has the same control and jurisdiction over such judgment as it has over similar judgments given by itself, but insofar only as relates to execution under this section. According to this Act rules of the registering court provide for service on the judgment debtor of notice of the registration of the judgment, and for enabling the registering court on an application by the judgment debtor to set aside the registration of a judgment under this Act on such terms as the court thinks fit, and finally for suspending the execution of a registered judgment until the expiration of the period during which the judgment debtor may apply to have the registration set aside.

The registration of a judgment under this Act is optional only but according to section 5 the plaintiff is not entitled to recover any costs of the action brought on the judgment unless an application to register it has previously

been refused or unless the court otherwise orders.

This Act is to be extended by Order of Council to various parts of the British Commonwealth, insofar as similar reciprocal enactments have been made by the relative legislatures. It has, in fact, been extended to most of the colonies and self governing dominions. The operation of this statute is different from that of the Judgments Extension Act of 1878 in that under the former Act the registering court has completely discretionary power to grant or refuse registration. As regards matters dealt with here this statute might be made available only in respect of enforcement of orders or judgments awarding costs or damages to be paid by a co-respondent.

(c). Foreign Judgments (Reciprocal) Enforcement Act 1933.
(10 & 23 Geo V, c. 13).

This Act makes provision for the reciprocal enforcement of judgments rendered by the courts of such foreign countries as are prepared to give reciprocal treatment to judgments of the United Kingdom. By Orders in Council of 1936 Part I of the Act was extended to France and the same Part I of the Act was applied generally to the dominions of the British Empire by an Order in Council of Nov. 10, 1933.

By sec. 11 (2) it is provided that for the purpose of that Act the term " action in personam " shall not be deemed to include any matrimonial cause or any proceedings "in connection with matrimonial matters." For the sake of clarity only mention has been made of that Act; since it does not according to the provision just cited refer

9
~~the shall~~
to the subject matter treated in this thesis, ~~it will~~ C
not be entered into a detailed discussion of that Act.

Now I pass to the consideration of statutes which deal particularly with the subject matter of judgments or orders concerning matters ancillary to divorce.

(d). By the Indian and Colonial Divorce Jurisdiction Act, 1926, (16 and 17 Geo. 5 c 40) it is provided that Indian courts, if the requirement of jurisdiction are complied with (see p.242) may also as incidental to the exercise of their jurisdiction make any order for damages, alimony, or maintenance and custody of children, and costs; orders for alimony or maintenance and custody of children operate forthwith, whereas a decree or other order have effect only after registration. A decree or order of the latter sort made in India may be registered in the Principal Probate Registry in England or the books of Council and Session in Scotland, according as the persons divorced are domiciled in England or Scotland and as from that date the decree or order has the same effect as if originally made in England or Scotland as the case may be. Application for registration may be made by any person having any interest in the decree or order, including the respondent. This Act applies also to a number of colonies to which it has been extended; see the list of these colonies on p.242.

Wilkins v. Wilkins (1932) W.N. 118. This Act is not to be extended to self-governing dominions.

(e) Maintenance Orders (Facilities for Enforcement) Act 1920, (10 & 11, Geo V c 33)

This act facilitates the reciprocal enforcement of orders

of periodical payment of sums of money for the maintenance or support of a wife and child if pronounced by a court of superior jurisdiction in any part of the British dominions to, which the Act by Order in Council has been applied; such orders may be registered in the Divorce Registry for enforcement in the P.A.D. Division and vice versa such an order made in the Divorce Division may be registered and enforced in the respective dominions on transmission of a copy of the order by the Secretary of State.

Before the passing of this Act such orders could not be enforced because of lack of that requirement of finality dealt with on p.292...

Scottish law on enforcement of foreign judgments concerning matters ancillary to divorce:

The leading Scottish case on this subject is

Westergard v. Westergard (1914) SC 977. In this decision the court held that a foreign decree awarding custody of children which was rendered by a competent court in a divorce proceeding is to be recognised as binding upon the court ; this decision was followed in

Radojewitch v. Radojewitch (1930) S C 619.

In Ponder v. Ponder (1932) S C 233 the Court emphasised that such a custody award, being a decision as to status , was a judgment in rem and had universally binding effect.

U.S.A. law:

By the decision of Hulton v. Guyot (1895) US 113 it was laid down that foreign judgments in personam would be

conclusive evidence on the merits, unless there were lack of reciprocity, in which case it would be presumptive evidence only.

Yet, as a rule, reciprocity is, as under English common law, no requirement of enforcement of foreign judgments. See decision of the New York court of Appeal in *Dunstan v. Higgins*, 138 NY 70 (1893) by which a foreign judgment is declared to be conclusive upon the merits and impeachable only for lack of jurisdiction in the international sense or for fraud.

(a) Maintenance orders.

By the decisions in *Sistare v. Sistare* 218 US (1910) and *Yarborough v. Yarborough* 290 US 202, 214 (1933) the Supreme Court held that according to the constitutional "full faith and credit clause" maintenance orders must be given extraterritorial effect, at least as to past due payments.

(b) Custody awards.

Custody awards made in divorce proceedings are granted extraterritorial recognition ~~also~~ by reason of the "full faith and credit clause"; it is up to now not settled whether the latter clause is applicable to custody awards as non-pecuniary matters, since some decisions take the view that this clause is applicable to pecuniary matters only.

A decree awarding custody of children ~~is~~ rendered in divorce proceedings by a court of the children's domicile, is recognised as final and conclusive as to the facts and

circumstances prior to the rendition, of the decree.

People ex rel. Tall v. Tall 245 App. D 508,283 NYS 183(1935).

There are various views on the question whether the modification of such custody orders by the court which rendered them is to be recognised in another state. Some decisions take the view that such orders being decisions as to status are judgments quasi in rem and have a universally binding effect.

Pieretti v. Pieretti 13 NJ Misc. 98, 176 Atl.589, see also Wakefield v. Ives, 35 Iowa 238 (1872)

Wheeler v. Wheeler, 184 La 689, 167 So 191 (1936Z))

others decline to recognise such modification of custody awards:

Larson v. Larson, 190, Minn. 489, 252 NW 329 (1930)

Finally, the view prevails that where a party who disregards a custody order e.g. by removing the child out of the jurisdiction into another state in spite of a contrary direction by the court, seeks a modification of the original order, such modification is to be refused in this other state.

French law:

As to arts. 2123 and 2128 CC. and art. 546 CPC concerning enforcement of foreign judgment see p.256.

Unless a treaty on enforcement exists, a foreign judgment can be enforced in France by virtue of the so-called exequatur only which a French court will grant after having examined it on its merits. The requirements of enforcement are as follows :

(1). The person who seeks execution on a foreign judgment must satisfy the French court that the foreign court

which pronounced that judgment had jurisdiction according to French rules of conflict of laws and that no rule of French procedure has been violated relating to a French citizen against whom execution is sought.

Paris, March 17, 1922(DP 124 - 2 - 81).

(2) The foreign law applied to the case in dispute must have been selected according to the French conflict rules as regards choice of law .

(3) The foreign judgment must not be repugnant to the principles of public order. Thus in a case of a foreign judgment by default where the defendant has not been given due opportunity to be heard, the French court refused to grant the exequatur.

Seine, Nov 23, 1922, Journal 1923 - 295).

The above rules apply to all kinds of judgments including those relating to matters ancillary to divorce.

Austrian law:

The requirements of enforcement of foreign judgments, unless provisions relating thereto are made by a treaty, are regulated by the Austrian court concerning executory proceedings of 1896, Imperial Law Gaz. 79,(Executions-ordnung) as follows :

(1). Foreign judgments or orders are enforceable only if it appears from an Order published by the Minister of Justice in the Federal Law Gaz. that the foreign state concerned will accord reciprocal treatment to Austrian judgments. and if

(2). The foreign court had jurisdiction in the international sense to pronounce the judgment according to

Austrian conflict rules (para. 80, I 1c).

(3). If the person against whom execution is sought has been served with the original summons in person in the country of the foreign court or by letters of request in another country ; thus substituted service or service by publication is excluded. (para. 80, II).

(4). if it is proved by a certificate of a foreign court that no appeal from the foreign judgment lies barring its enforceability (para. 80 II 1.c.)

Although the requirements mentioned above are complied with, Austrian courts will according to para. 81 of the above statute refuse enforcement of a foreign judgment if

(a) the person against whom execution is sought, has been prevented from being heard in the process by any irregularity caused by the foreign court, or if

(b) an act is to be enforced by way of execution which is forbidden or not enforceable under Austrian law, or if

(c). the foreign judgment concerns the civil status of an Austrian citizen and it is sought to put it into execution against him. or if

(d). by way of the execution a legal relation is sought to be recognised or a right is to be enforced which is under Austrian law inadmissible and not actionable with regard to the principles of public policy and good morals. These grounds do not include any challenge of the decision on its merits, except in that degree as stated above.

If the above requirements are complied with the court issues an order declaring the foreign judgment to be enforceable.

The person against whom execution is sought may apart

from entering an ordinary appeal (recours) from such order object to it within a fortnight from the date on which such order has been served upon him on the ground that the requirements are not present; the court which rendered the order after hearing both parties may affirm modify or revoke its order as it thinks fit. (para.83,1.c).

German law :

In the absence of treaties a foreign judgment can be rendered executory by a judgment only which declares it to be enforceable by way of execution. (para.722 of CCP). The requirements of enforceability of foreign judgments are;

(a).that it is final and conclusive according to the law of that country whose court rendered it.

(b) that its recognition is not excluded on a ground specified in para. 328, CCP.; the latter requirements have been fully discussed under the heading of recognition of foreign judgments; yet certain additional remarks require to be made in order to clarify the combined operation of those sections 328, 722 and 723 CCP as to matters ancillary to divorce. Sec. 723 1 c. lays down that the foreign judgment is not to be examined on its merits and whether the requirements just stated are complied with judgment is to be given pronouncing the foreign judgment enforceable.(vollstreckungsurteil).

The court is to inquire ex officio whether the requirements for enforceability of the foreign judgment are complied with, except the case of No. 3 of sec. 328 CCP as above stated. According to para. 2 of sec. 328 CCP reciprocity

is no requirement for recognition and enforcement of a foreign judgment if the latter does not affect claims relating to real or personal property and if according to German law German courts have no jurisdiction, as, ✓ for instance, in case where enforcement of an award of non - pecuniary character, such as an award of custody of children is sought; in all other cases, especially in case of money judgment reciprocity is a requirement for its enforcement.

Furthermore the foreign judgment must not be repugnant to rules of common decency or to the avowed purpose of a German legislative enactment. Thus a decree of divorce pronounced by a court of the State of New York awarding maintenance to the innocent spouse was not recognised and its enforcement declined mainly (1) because it imposed a restriction on remarriage upon the guilty party till death of the innocent party and (2) because the procedural rules of the State of New York as regards divorce did not provide for intervention of the Public Prosecutor whose function under German law was to safeguard the public interests inherent in the marital status.

KG . February 16, 1909, ROLG 19,106,J.1911,286.

Finally, the party against whom execution is applied for may sustain pleas based on facts only which subsequent to the ~~the~~ entry of the foreign judgment extinguished the rights derived therefrom. sec.767 CCP: decisions of the Imperial Court RG 36,381; 75,148.

Swiss law :

Since the legislation concerning procedural rules is left to the cantons, each canton has its own Code of Civil Procedure by which it is also regulated what qualities a foreign judgment must possess if it is to be enforced by way of execution.

Thus by para. 752 of the Code of Civil Procedure of the Canton Zurich and para. 519 of the Code of Civil Procedure of the Canton Waadt it is required for the enforceability of a foreign judgment :

- (1) that the courts of the foreign country accord reciprocal treatment to Swiss judgments,
- (2) that the foreign judgment is final and conclusive and enforceable by way of execution under the law of the foreign country whose court pronounced it,
- (3) that the court which rendered the judgment had jurisdiction to pronounce it, and
- (4) that the foreign judgment is not repugnant to public policy.

The foreign judgment is not to be examined on its merits.

Statutory provisions similar to those just mentioned are in force in most Swiss Cantons.

of the native country requires for the recognition of foreign judgments.

^{7 f/} Similar rules obtain in the Continental systems of law concerned, except for German law under which the requirement of due service in case of a foreign judgment in default relates to a defendant of German nationality only. (para. 328 (II) of the German Code of Civil Procedure).

By arts. 4 and 8 of the Convention, in case of change of nationality or of diversity of nationality of the spouses the question whether or not divorce is recognised or a ground of divorce is admissible, is controlled by the national law of both spouses, while under German law these questions are governed by ^{/national/} the law of the husband alone.

Furthermore, it is important to note that the operation of the principle of public policy as to matters of divorce is excluded within the purview of the Convention. For details on the subject of recognition reference is made to p. 167. The Convention contains no rules as to enforcement of orders or judgments concerning matters ancillary to divorce; except for provisional measures which the domiciliary law grants in view of the cessation of common life, in case where the spouses are not authorised to bring an action for divorce or separation in the country in which they are domiciled. (art. 6 of the Convention.)

(II). It is further noteworthy that the Hague Convention of July 17, 1905 on International Civil Procedure by abolishing the Alien security for costs that had to be given by a plaintiff alien, has secured as far as subjects of the states signatory to the Convention are concerned international execution of judgments in respect of procedural costs awarded in such cases.

(arts. 17 and 18 of the Convention of 1905).

The only requirement for enforcement of such an order awarding procedural costs is that it is final and conclusive according to the law of the country whose court rendered it. (art. 19 of the Convention of 1905).

(III). In the absence of treaties each country formulates its own rules relating to recognition and enforcement of foreign judgments. From the above discussion it is clear that the extent of the requirements for recognition of foreign judgments differs greatly from that of the requirements for their enforcement.

To the mode of execution itself the internal rules of the forum are exclusively applicable. The fact may only be stressed here that there are two main groups of countries with regard to the problem of recognition and enforcement of foreign judgments:

By the law of the one group the courts examine the foreign judgment on its " l e g a l i t y " only with respect of a certain specified set of requirements such

as (1) whether its own conflict rules as to jurisdiction have been observed and

(2) whether the judgment offends against the principles of public policy and natural justice, but without any inquiry on the merits of the judgment; England, for instance, belongs to this group ; from the above discussions, however, it appears that statutes mainly regulate enforcement of judgments concerning matters ancillary to divorce which have been pronounced by a court of a part of the British Commonwealth, while common law controls enforcement of such judgments rendered by courts of other foreign countries.

The courts of the other group, on the contrary, examine the foreign judgment on its "legality" as well as on its merits; France, for instance, adheres to the latter group.

Furthermore, in the Anglo-American systems of law the validity of a decree of divorce rendered by a court other than that of the domicile of the spouses concerned depends on whether the decree is recognised by the law of the spouses' domicile, while under the Continental systems of law the validity of a judgment of divorce rendered by a court other than the national one generally depends on whether the judgment is recognised by the national law of the spouses concerned.

(IV). Common to all systems of law concerned is this that no reciprocity is required for recognition of foreign judgments of divorce; but where enforcement of an order or judgment concerning matters ancillary to divorce is sought reciprocity is required under the Continental systems of law; see p.276.

(V). Further similarities common to all those systems of law are:

(a). A court deciding the question of recognition is required to ascertain only whether the foreign court which pronounced the judgment had jurisdiction in the international sense; except for Italy whose courts also inquire whether the foreign court had the so-called territorial (domestic) jurisdiction,

(b). The requirement, whereunder the foreign decree must not be ^{re} ~~imp~~ugnant to ^{the} public policy of the respective country is also common to all the systems concerned, yet the scope of the principle of public policy varies in each of them. The main difference as to the scope of this principle lies in that the theory of the Anglo-American system takes only their own public policy into consideration while the Continental systems in many respects have regard to their own public policy as well as to that of the foreign country concerned.

(c). The rules as to enforcement of foreign judgments prevailing in the British Commonwealth have been modified and in many a respect assimilated to those prevailing in the Continental systems of law by the passing of the English Statutes on enforcement of foreign judgments discussed in chapter pp. 295 ff.

whereas under common law a foreign judgment could be enforced only by an action brought thereon, immediate execution may now follow the foreign judgment registered according to those statutes.

* * * * *